Public Document **No. 12**

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1929

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The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, January 15, 1930.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1929.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

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The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
State House.

Attorney General.

JOSEPH E. WARNER.

Assistants.

FRANKLIN DELANO PUTNAM.
ROGER CLAPP.
CHARLES F. LOVEJOY.
EMMA FALL SCHOFIELD.
GERALD J. CALLAHAN.
JAMES S. EASTHAM.
R. AMMI CUTTER.
EDWARD T. SIMONEAU.
STEPHEN D. BACIGALUPO.
GEORGE B. LOURIE.
LOUIS H. SAWYER.[1]

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

[1] Appointed May 1, 1929.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1929	$106,000 00
Appropriation for small claims	5,000 00
Supplemental appropriation	3,000 00
Special attorney for electric light rates cases	25,000 00
	$139,000 00

Expenditures.

For salary of Attorney General	$8,000 00
For law library	555 05
For salaries of assistants	47,126 99
For salaries of all other employees	19,803 46
For legal and special services	10,694 78
For office expenses and travel	4,927 31
For court expenses	2,810 36
For small claims	1,888 22
For publication of opinions	4,420 31
For special attorney for electric light rates cases	20,000 00
Total expenditures	$120,226 48

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 15, 1930.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1929, to the number of 10,125 are tabulated below:

Corporate franchise tax cases		1,656
Extradition and interstate rendition		273
Grade crossings, petitions for abolition of		55
Land Court petitions		132
Land-damage cases arising from the taking of land:		
Department of Public Works		76
Department of Mental Diseases		8
Department of Conservation		1
Department of Public Health		3
Department of Correction		3
Metropolitan District Commission		62
Metropolitan District Water Supply Commission		15
Miscellaneous cases		947
Petitions for instructions under inheritance tax laws		48
Public charitable trusts		275
Settlement cases for support of persons in State hospitals		15
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth		6,525
Indictments for murder, capital cases		31
Disposed of	20	
Now pending	11	

I. ADMINISTRATION OF CRIMINAL JUSTICE SUPERVISED BY THE ATTORNEY GENERAL.

It is the duty of the Attorney General to "take cognizance of all violations of law . . . affecting the general welfare of the people . . ." In any criminal proceedings undertaken as a result of such cognizance, the district attorneys may assist him, and under his direction act for him. (G. L., c. 12, § 10.)

The district attorneys appear for the Commonwealth in the Superior Court in all cases arising within their respective districts, and "aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally." (G. L., c. 12, § 27.)

The administration of criminal justice, therefore, is effected in general either through the office of the Attorney General or the offices of the district attorneys in prosecution of violations of law, with which, by statute, he is primarily charged, or effected through the offices of the district attorneys in prosecution of violations of law arising in their several districts, with which, by statute, they are primarily so charged.

The fourteen counties of the Commonwealth are divided into eight districts with district attorneys, as follows:

Western (Berkshire and Hampden Counties), Charles R. Clason.
Northwestern (Hampshire and Franklin Counties), Charles Fairhurst.
Middle (Worcester County), Charles B. Rugg.
Northern (Middlesex County), Robert T. Bushnell.
Eastern (Essex County), William G. Clark.
Suffolk (Suffolk County), William J. Foley.
Southeastern (Norfolk and Plymouth Counties), Winfield M. Wilbar.
Southern (Bristol, Barnstable, Dukes and Nantucket Counties), William C. Crossley.

In so far as law enforcement is effected by prosecutions of violations of law in the Superior Court, these eight district attorneys and the Attorney General are the sole units upon which the people must rely. Law enforcement primarily in the various cities and towns lies within the purview of the district and municipal courts and city and town officers; the measure of its aggressiveness must depend for its stimulus upon the genuineness of community sentiment.

The mere number of undisposed of cases upon a criminal docket is entitled to little significance; as, for example, it records every defendant not yet in custody; already found guilty by verdict or plea but awaiting sentence; on probation; complying with orders of court as to payments; insane; under observation for insanity; defaulted; booked after last court sitting. Nor can mere numbers be taken as sole index to determine increase or decrease of crime or of criminals. Every so-called "count" in an indictment is a "case." Several counts in an

indictment may but relate to the various aspects of a single crime. A verdict on a single count may eliminate all the others. Several "cases" may apply to but one individual.

The sum total of cases is not a fair standard of increase or decrease of criminality, as such total necessarily includes both the misdemeanor and the felony. Felony alone leads to state prison. (G. L., c. 274, § 1.) A sober gauge of criminality is the prevalence of felony.

Nor is the number of pending triable cases of itself a basis for true comparison either as to the efficiency or zeal of a district attorney. In some districts criminal sittings are had more often and more continuously than in others, affording greater facility for hearing and disposition of cases. In two counties the sitting of the Superior Court, in each, is a mixed session for the transaction of both civil and criminal business, which, of course, curtails opportunity for disposition of felonies; and in one of these there has been no court sitting since April, particularly for the disposition of misdemeanors.

Some districts are bounded in a single county and have a single trial docket; others have two or more counties, with intercepted court sessions. The districts vary also in character. The Northern is considered largest in population plus area; Suffolk, most constricted in area and congested in population, had, this year, 40 per cent of the State's criminal business; the Southern is the rangiest, with Bristol County, urban and rural; Barnstable, doubly coast bordered, stretching more than seventy miles; old Nantucket, sea girt; and the County of Dukes County, the Isle of Marthas Vineyard. Lack of uniformity makes comparison impossible.

The dockets disclose disposal of 17,534 cases, and in general, that there are pending but four triable murder cases, not a great number of felonies, nor an unusual number of misdemeanors; that both felonies and misdemeanors have been tried without delay; that appellants from lower courts have not benefited by appeals; that the criminal dockets are not congested; that district attorneys are now ready to prosecute at once violations as they shall arise; that the violators of law in this Commonwealth can find no comfort in any reliance upon a congested docket either to delay trial or to barter the riddance of a case for a plea to a lesser offense. We challenge historians to show any period in comparable annals of the Bay State when criminal justice has been swifter or surer than it is today.

In capital cases the statute already requires that, whenever a person is held in custody on indictment by a grand jury, the State be ready to prosecute at the sitting of the court next after six months from the date of indictment. (G. L., c. 277, § 72.) Another statute prescribes precedence for trial of felonies and liquor violations. (G. L., c. 212, §§ 24–29; St. 1926, c. 228.) But let it be particularly noted that in all districts the trial of a felony invariably is had at the sitting of the court immediately subsequent to the indictment.

Moreover, the use of district court judges sitting in the Superior Court to hear misdemeanor cases, begun in 1923, has proved of great value. So, congestion of the criminal docket has almost vanished and clearance has been promoted, with a logical and subsequent specialized attention to both groups, thereby facilitating and particularizing misdemeanor dispositions as well as assuring more careful and thorough trial of those on appeal. This procedure has demonstrated the futility of frivolous appeals.

In the Western District, Mr. Clason reports that there are 63 cases pending in Berkshire and 190 in Hampden. Of the 63 cases in Berkshire, excluding secret indictments and defendants on probation, there are but 35 pending triable cases — all misdemeanors, principally appeals from the lower court since the last sitting of the Superior Court in July, with prospect of disposition at the January sitting in 1930; that, of the cases disposed of in that county during the current year, approximately a third were those arising since January 1, 1929; that the oldest pending cases are a non-support from 1927 and only 9 from 1928 (4 of which are bails); that as to the 190 cases pending in Hampden, the misdemeanors concern but 54 defendants, the felonies but 3; that on January 1, 1929, the number of cases pending was less than half the number pending January 1, 1927; and that by January 1, 1930, there will be about one-fifth of this half; that the trial of the last murder case in this county was on October 1, 1928, within five months from the date of indictment, obtained at the very first sitting of the grand jury after commission of the murder.

In the Northwestern District, Mr. Fairhurst reports that the Hampshire County docket affects 60 defendants: 5 felonies, with plea of guilty in 1; no court sitting since April for disposition of misdemeanor balance; 1 murder case, with sanity not yet determined; in Franklin County, 2 felonies, and 4 misdemeanors.

In the Middle District, Mr. Rugg reports 14 criminal cases pending in Worcester County, with pleas of guilty in 8; none of murder, manslaughter, or robbery; that, in the only two capitals occurring and tried in the last two years, conviction in one was had two months after arrest of the accused, and in the other, three months after commission of the murder; that in the four years, January 1, 1920, to January 1, 1924, the number of docketed cases nearly doubled; that there has been a steady annual reduction since, so that, although January, 1929, showed slight increase over January, 1928, the number then pending was only 300 more than in January nine years before.

In the Northern District, Mr. Bushnell reports that in Middlesex County there are no murder cases pending; that all cases were disposed of in the arduous ten months of court sittings.

In the Eastern District, Mr. Clark reports only one murder case pending, with defendant under observation; that the felony docket is in better condition than ever before; that in this district there are five trial justices whose jurisdictions are so limited that many misdemeanors, usually dealt

with by district courts, require grand jury proceedings, augmenting misdemeanor totals.

In the Suffolk District, Mr. Foley reports that there are but two triable murder cases pending, murders committed in September and October last; that in five others, he awaits arrest of defendants in three and restoration to sanity in two; that of total pending cases, those prior to January 1, 1928, involve but seven defendants not yet in custody, or sane; that the total is less than half that of January, 1929, which was then the lowest recorded; that during his administration one trial for murder was had within sixty-seven days from the date of murder, and no murder trial has been had later than seven months after the date of murder, including indictment and apprehension.

In the Southeastern District, Mr. Wilbar reports that in Norfolk and in Plymouth counties no triable murder case pending; that in the other capital cases, insanity or question of sanity prevents trial; in Plymouth County but one felony pending (polygamy), and not more than four larcenies; that the current total in the district is about the same as in 1928, with a slight decrease in cases for prosecution of liquor violations.

In the Southern District, Mr. Crossley reports no capital case pending in the four counties; few felonies of magnitude; that in Barnstable County the misdemeanor list is low; in Nantucket County, two misdemeanors; in Dukes County, two misdemeanors, and a recent indictment for assault to murder and charges for robbery undisposable until the next court session in April; that in Bristol County, for one example, in the current year, five defendants were apprehended, indicted, convicted and sentenced, four of them receiving long sentences, on charges arising out of a robbery at gun point, — all within sixteen days.

Recommendations of District Attorneys.

The recommendations of the district attorneys in which I concur are as follows:

1. That there be revision and clarification of the criminal statutes, to the end that they may be carefully harmonized; that this be done by a learned commission of wide practical experience in the criminal law, appointed by the Governor; that a final report be required not earlier than the second General Court from the date of its appointment; that it may recommend substantive changes and repeal of obsolete and archaic laws.

The learned Judicial Council is chiefly, if not principally, concerned with procedure. Though a special commission under Res. 1923, c. 34, made investigation "relative to the criminal law," its constructive report stated that substantive changes were not within the scope of its authority, and that, even if they had been, such fundamental changes could not be sufficiently formulated in the few months designated in the resolve.

Certain private agencies have recently undertaken to study some aspects of the substantive and procedural criminal law in force in Massachusetts. Notable among these investigations now in progress is that of the Harvard Law School Committee, authorized by the President and Fellows of Harvard College to make use of certain of the resources of the Milton Fund for this purpose. This investigation, which was first undertaken some two years ago, has not yet been terminated by a formal report. The fact that the committee has been at work so long indicates the amount of time needed to obtain and digest the statistics essential to a comprehensive report. Despite the fact that any commission appointed by the Governor will presumably have at its disposal the work of various private agencies, including that of the Harvard Law School Committee, it will be necessary, in my opinion, to give to the commission at least two years in which to gather and compile information and data, and probably a further period in which to prepare adequate and well-considered recommendations.

2. That police officers may have the same powers, which investigators and examiners appointed by the Registrar of Motor Vehicles have, to arrest persons operating motor vehicles while under the influence of intoxicating liquor. As the law now is, a police officer cannot arrest a person *upon such charge* without a warrant, if the person has his license to operate in his possession, unless such person is drunk or is a suspicious person, in which event he may be arrested on the respective charges.

The power of officers to make arrests without warrant for violations of laws relating to motor vehicles is found in G. L., c. 90, as amended by St. 1921, c. 349, which provides for the arrest of "any person operating a motor vehicle on any way who does not have in his possession a license to operate motor vehicles granted to him by the registrar, and who violates any statute, by-law, ordinance or regulation relating to the operation or control of motor vehicles; . . ." The power of investigators or examiners appointed by the registrar to make arrest without warrant is also defined therein, namely, to make arrest of "any person operating a motor vehicle while under the influence of intoxicating liquors, irrespective of his possession of such a license."

G. L., c. 90, § 21, as amended by St. 1921, c. 349, should be so amended that the powers of a police officer may specifically include power to make arrest of "any person operating a motor vehicle on any way while under the influence of intoxicating liquor or drugs," and who "otherwise" violates any statute, etc.

II. ADMINISTRATION OF CIVIL BUSINESS.

Cases of Interest wherein the Attorney General appears for the Commonwealth.

A. CASES DECIDED DURING THE YEAR.

1. In the Supreme Court of the United States.

Ex parte Worcester County National Bank, 270 U. S. 347. This case involved the construction and the constitutionality of certain portions of the so-called MacFadden bill amending the National Banking Act, authorizing the direct consolidation of State trust companies with national banks under the charter of a national bank involved in the merger. The Supreme Judicial Court of Massachusetts (263 Mass. 444) had decided that the Federal act purported to authorize the consolidated national bank to succeed without any new appointment by the court to the executorship trust and other fiduciary positions held by the absorbed State trust company under appointments of Massachusetts probate courts, and that, if this was the will of Congress, the act was unconstitutional as interfering with the reserved power of the State to regulate the administration and probate of estates of deceased persons who last dwelt within the Commonwealth.

The case arose upon the petition of the consolidated national bank to file an account as executor in an estate in which the absorbed trust company had originally been appointed. The case, although involving no large amount of money, raised a very important principle of constitutional law in which the State had a decided interest from the standpoint of maintaining the integrity of its probate courts from interference by the Federal government. The Attorney General requested leave of the Supreme Court of the United States to file a brief as *amicus curiae*, which was granted. The court, departing from its usual custom, also granted leave to this department to present an oral argument. The case was argued by Hon. Newton D. Baker for the appellants and by Assistant Attorney General Putnam for the Commonwealth. Oral argument was made. The Supreme Court affirmed the decree of the Massachusetts court upon grounds which, as is disclosed by the printed record, were first suggested in the brief of the Attorney General.

2. In the Federal Courts.

Rate Cases.

The electric light rate cases brought by the Worcester Electric Light Company and the Cambridge Electric Light Company, and referred to as pending in my report of last year, were ended during the present year by entries of decrees in the United States District Court sustaining the contention of the Commonwealth. The lower rates ordered by the Department of Public Utilities thus remain in effect.

3. In the Supreme Judicial Court.

(*a*) *Tax Cases.*

Beside one tax case[1] in the Supreme Court of the United States, this department has represented the Commonwealth in seventeen cases before the full bench of the Supreme Judicial Court, involving important points in the construction of our corporation and legacy tax acts, and in five cases before a single justice. In all but one[2] of the eleven[3] tax cases decided by the Supreme Judicial Court of the Commonwealth, the contentions of the Commonwealth have been sustained.

(*b*) *Other Cases.*

In the eleven cases involving constitutionality of statutes,[4] charitable trusts,[5] validity of departmental acts,[6] the Commonwealth was sustained.

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[1] *Macallen Company* v. *Commonwealth*, 264 Mass. 396; reversed by the Supreme Court of the United States, *sub nom. Macallen Company* v. *Massachusetts*, 279 U. S. 620.

[2] *Henry B. Cabot et als., Executors,* v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 1239, held that a receipt in full given by the Commissioner of Corporations and Taxation prevents the Commissioner from later making an additional assessment where the net estate of a Massachusetts decedent is increased due to a rebate of a Federal estate tax previously allowed as a deduction by the Commissioner in computing the Massachusetts inheritance tax.

[3] *Hood Rubber Co.* v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 1747, sustained the construction of G. L., c. 63, § 36, adopted by the Department of Corporations and Taxation since the enactment of the statute.

Anna W. Wolbach v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 1757, sustained an income tax upon interest paid to the relatives of a deceased partner by the surviving partners.

Charles F. Ayer v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 2195, sustained an income tax imposed upon dividends received by the taxpayer from a joint stock company organized under the laws of Michigan for the purpose of conducting mining operations in that State.

Edith C. C. Ames v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 2247, sustained the action of the Commissioner of Corporations and Taxation in denying a refund of certain taxes paid by the taxpayer "on account" of a legacy tax.

Harold S. Coolidge et al., Trustees, v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 1831, is mentioned subsequently in this report.

Queens Run Refractories Co. v. *Commonwealth*, Mass. Adv. Sh. (1930), sustained the contention of the Tax Department that the complainant company was "doing business" within the meaning of G. L., c. 63, § 32.

Essex Theatres Co. v. *Commonwealth*, Mass. Adv. Sh. (1928) 1967, sustained the minimum excise on certain corporations provided in G. L., c. 63, § 32A.

George A. Bacon v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 747, sustained an income tax imposed upon an annuity received by a taxpayer under the provisions of G. L., c. 62, § 5.

Mary J. Follett v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 917, sustained the tax imposed upon a liquidating dividend received by the taxpayer.

Boston Safe Deposit & Trust Co. v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1929) 1233, sustained the validity of a Massachusetts succession tax upon a trust created *inter vivos* without the absolute power of revocation; the trust provided for the payment of the income to X during her life, and upon her death the principal of the trust back to the settlors if living, and if not living over to grandchildren of the settlors.

[4] *Commonwealth* v. *Kresge Co.*, Mass. Adv. Sh. (1929) 1205, held that St. 1926, c. 321 (regulating sale of eyeglasses), was constitutional; and upheld conviction for violation thereof.

Bauer v. *Civil Service Commission*, Mass. Adv. Sh. (1929) 2399, upheld constitutionality of G. L., c. 31, § 23 (in the Veteran's Preference Act), and dismissed petition for mandamus to compel the commissioner to certify the name of a non-veteran who had received the highest examination mark, but whose name had been given by the commissioner an inferior position on the eligible list.

[5] *Arthur H. Brooks* v. *Caroline A. Pierce et als.*, Mass. Adv. Sh. (1929) 357, sustained the contention of the Attorney General that under a particular will a charitable gift to a class of unknown persons took precedence over arrears in annuities to beneficiaries named in the will.

[6] *Selectmen of Topsfield* v. *Department of Public Utilities*, Mass. Adv. Sh. (1929) 945, sustained validity of an order granting a right to locate transmission lines across certain public ways.

4. In Other Courts of the Commonwealth.

(a) *Eminent Domain Cases.*

In eminent domain cases, commonly known as "land damage" cases, the Commonwealth takes the land of individuals for a public purpose, such as the construction of highways and state institutions. An award is always made to the owner of the land for his damage sustained by the taking. If dissatisfied with the amount of the award, each owner may appeal to a jury for assessment of damages. In every case assessment necessarily is against the Commonwealth. However, in a great majority, satisfactory verdicts were obtained. Many others have been settled upon terms mutually agreeable to the petitioners and to the Commonwealth.

(b) *Other Cases.*

In 10 tax cases before the Superior Court, and in numerous hearings in connection with legacy tax matters before the Probate Court, the department was successful in upholding the tax or contention, in major measure.

B. CASES PENDING NOVEMBER 30, 1929.

1. In the United States Supreme Court.

(a) *Interstate Controversy.*

The State of Connecticut v. *the Commonwealth of Massachusetts.* For the purpose of providing an adequate water supply for the Metropolitan District, St. 1926, c. 375, and St. 1927, c. 321, respectively, authorized the diversion of a small quantity of water from the Ware and Swift rivers which otherwise would flow into the Connecticut River through this Commonwealth and thence into Connecticut.

The State of Connecticut, late in 1927, filed a bill in equity against this Commonwealth in the Supreme Court of the United States seeking to enjoin the diversion, alleging that, in the event this enterprise is carried out, the State of Connecticut and its citizens will suffer serious injury due to the diminution of the flow of the Connecticut River in

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Horton v. *Attorney General.*

Same v. *Secretary of the Commonwealth* (decided Dec. 30, 1929, while this report is in press).

Dismissed petitions to quash Attorney General's certificate of an initiative measure and for mandamus to restrain Secretary of the Commonwealth from transmitting such measure to the General Court.

Brest v. *Commissioner of Insurance.*

Nichols v. *Same,*

Casassa v. *Same* (decided Jan. 8, 1930).

Sustained demurrers of the respondent to each of the bills petitioning review of rates made by the Commissioner of Insurance for compulsory motor vehicle insurance.

Wallace, Petitioner, Mass. Adv. Sh. (1928) 2071, denied petition for a writ of *habeas corpus* and sustained the executive warrant.

Delia Dwyer v. *Keniston et al.* (decided Jan. 1930), dismissed petition for mandamus against the Metropolitan District Commission to grant entrance into premises from a boulevard.

Nine cases, already argued, have not yet been decided.

that State. This department filed an answer in behalf of the Commonwealth and the case is now pending in court.

The Secretary of War approved the Ware River project so far as its effect on navigation was concerned on March 14, 1928. Similar approval of the Secretary of War was obtained with reference to the diversion from the Swift River on May 11, 1929. Subsequent to the action upon the Ware River project, the State of Connecticut filed a motion in the Supreme Court of the United States seeking to join the Secretary of War and the Chief of Engineers as parties defendant in the pending case, and to enjoin them from giving approval to the Swift River diversion, and to compel them to revoke the action upon the Ware River diversion. A brief was filed by this Commonwealth in opposition to that motion, and after consideration by the court the motion was denied.

The State of Connecticut has very recently filed a motion seeking to have the answer filed by this Commonwealth dismissed, and also a motion to have certain portions of the answer stricken out in the event that the entire answer is not dismissed. A brief has been filed by this Commonwealth in opposition to those motions, and the motions are now pending before the court. Oral argument upon the motions will take place on January 20, 1930.

Upon motion of Massachusetts, the court recently appointed Charles W. Bunn, Esq., of Minnesota as Special Master to hear the case and report to the court. In the event that the court decides adversely to Connecticut upon the pending motions, it is expected that hearings before the master will commence shortly thereafter.

This case is of the utmost importance to this Commonwealth. Upon it depends an adequate water supply for the Metropolitan District and an undertaking estimated at $65,000,000. The State of Connecticut has left no stone unturned to upset this project, and has taken advantage of every possible legal avenue of attack. Thus the Commonwealth has successfully opposed the only issue which has been decided by the Supreme Court so far, and every effort will be made to carry the entire case to a successful conclusion.

Bentley W. Warren, Esq., who was appointed Special Assistant Attorney General to conduct the case for the Commonwealth of Massachusetts, is being assisted by Assistant Attorneys General Callahan and Cutter.

(*b*) *Tax Cases.*

In *Harold J. Coolidge et al., Trustees,* v. *Commissioner of Corporations and Taxation,* decided September 13, 1929, the court affirmed the constitutionality of a Massachusetts succession tax on the property passing by a trust instrument which was executed *inter vivos* on July 29, 1907, before the enactment of the taxing statute, and wherein no power of revocation was reserved, and in a later assignment of which, in 1917, no beneficial interest

was retained in the settlors. The decision is important in its stressing of the succession aspect of the Massachusetts tax, and the importance of the determination of whether or not the succession is dependent in any way upon the death of the settlors.

Federal questions having been raised in the Massachusetts courts, appeal to the United States Supreme Court is now pending.

Willcutts, Collector of Internal Revenue, v. *Bunn* (U. S. Sup. Ct., Oct. Term 1929, No. 535). In this case this department has recently moved for and obtained leave to file a brief as *amicus curiae.* The lower Federal courts decided that the Federal government could not impose an income tax upon the gain derived from the sale of municipal securities issued by subdivisions of the State of Minnesota. For many years Massachusetts, by the provisions of G. L., c. 62, § 5 (*c*), has imposed an income tax upon the gain derived from the sale of Federal government bonds. A decision in the pending United States Supreme Court case will to all intents and purposes decide the validity of a tax long imposed by Massachusetts. At the request of Commissioner Long, therefore, this Department has by its brief sought to support the argument to be made by the Solicitor General of the United States in behalf of the tax imposed by the Federal government upon the gain from the sale of the Minnesota bonds.

2. In the Supreme Judicial Court.

Billboard Cases.

The billboard litigation is a consolidation of various bills in equity brought in the Supreme Judicial Court by the General Outdoor Advertising Company, the O. J. Gude Company, Edward C. Donnelly and John Brink against the Commissioners of Public Works, with which has been heard the bill in equity brought by the General Outdoor Advertising Company against the selectmen of the town of Concord. The John Brink case involves the Chevrolet sign on Beacon Hill. All the cases involve the constitutionality of the 1924 rules and regulations of the Department of Public Works for the control and restriction of billboards, signs and other advertising devices, under G. L., c. 93, §§ 29–33, as amended, and under Amendment L of the Massachusetts Constitution.

The complainants' case was finished in 1928. During the present year the preparation and presentation of evidence, on behalf of the respondents, and the rebuttal evidence by the advertising companies consumed almost the entire time of Assistant Attorney General Eastham, to whom the case had been assigned. In addition to five days spent on a "view" of the main highways of the Commonwealth by counsel and the master, there were forty-nine court days of hearings and seven days of argument. The record in the case contains 8,564 pages of testimony, between five and six thousand exhibits, and registers the total number of one hundred and sixteen court days.

It is expected that the arguments will be completed before the master, Frank H. Stewart, Esq., by December 26, 1929, and his report to the Supreme Judicial Court of the Commonwealth ready during the early part of 1930.

III. STATUTORY SERVICES OF INTEREST.

1. Settlement of Small Claims against the Commonwealth.

Since the period covered by my last annual report 34 claims have been presented against the Commonwealth under St. 1924, c. 395; 20 were approved, with a total expenditure of $2,742.52; 11 were rejected; 3 are still pending.

Of these claims 58 per cent was for damages occasioned by the operation of State automobiles.

2. Interstate Rendition.

There is great need for a uniform method of interstate rendition. The essential elements are now covered by the Constitution of the United States and Federal statutes enacted thereunder. Except as to certain minor details, which are left to the States, the Federal law is supreme and binding upon all States equally, and it is, of course, uniform in its application in the entire country. No State may constitutionally enact a statute which in any way conflicts with, adds to, or modifies the requirements set forth in the Federal law.

The chief difficulty is lack of thorough understanding of the law by officials charged with its administration. The governor of a State must, under the law, return to a demanding State a fugitive who is found within his State provided —

1. That a set of papers is duly received, authenticated by the governor of the demanding State, containing a copy of an indictment or affidavit, sworn to before a magistrate, charging the fugitive with having committed a crime within the demanding State.

2. That the governor of a State in which the fugitive is found is satisfied that the person is in fact the person so charged with the crime and named in the papers.

3. That the governor of the State, in which the fugitive is found, is satisfied that the person is a fugitive from justice. Under the law a person is a fugitive from justice if he was in the demanding State at or about the time the crime is alleged to have been committed, and if he is subsequently found in the asylum State.

4. That the request for the return of the fugitive is made in good faith on the part of the officials of the demanding State.

If these elements all appear, a governor, upon whom a request is made, must, under the law, return the fugitive; and other considerations, however important they may seem to him, must be entirely disregarded.

In certain cases executives of other States, it would seem, refuse to honor the request of the Governor of this Commonwealth for the return

of a prisoner on grounds other than those of law. The law provides no method of compelling a governor to comply with his duty in these cases, nor is there any appeal in case he refuses to do so. Although his *right* to refuse to honor a requisition is closely limited, nevertheless his *power* to do so is supreme and unlimited. There is nothing that the General Court of Massachusetts may do to correct the faulty administration of this matter in other States. In this Commonwealth requisitions from other States are treated in strict conformity with the law.

The weakness in the law of rendition, as pointed out above, is that there is no method of compelling a governor to return a fugitive in a proper case, and many governors, more or less naturally, confuse their legal right to refuse rendition with their power to refuse. In a proper case the governor's duty arises from a clear mandate in the Constitution of the United States and in the Federal statutes enacted thereunder. The duty is none the less mandatory even though no method is provided to compel a governor to perform his duty. Indeed, the obligation in some respects thereby becomes greater.

The rendition of fugitives from justice is an important phase of the administration of law in this country and Commonwealth. A full and complete understanding of the law by the governors of the States will do more than any other thing to place its administration on a basis which conforms to the law.

3. Quo Warranto (at Relation of Insurance Department).

At the relation of the Commissioner of Insurance, under the provisions of G. L., c. 175, § 6, as amended, a petition was filed against the Bristol Mutual Liability Insurance Company which the Commissioner believed to be insolvent. The matter was heard by the Supreme Judicial Court and a permanent injunction restraining the company from doing business was almost immediately issued, and a receiver was appointed by the court to settle its affairs and to protect the interests of policyholders and creditors.

4. Charitable Trusts.

The duties of the Attorney General to "enforce the due application of funds given or appropriated to public charities within the commonwealth" and to prevent "breaches of trust in administration thereof" (G. L., c. 12, § 9) both entail, first, supervision of the administration of funds by functioning charities, and second, recommendation to the courts for use of trust funds, non-functioning because original purposes have become impracticable or impossible of execution.

The first involves on the part of the Attorney General approval of all trustees' accounts of all charitable trusts (such approval is now made prerequisite by the judges of the several probate courts for allowance of such accounts), and investigation and approval of successors to trustees

resigned or deceased. Current experience, noting misappropriation of trust property, suggests that probate courts require all trustees of charitable funds, or at least the treasurer of each board of trustees, to provide bond for the faithful performance of duties, and that sole charge and custody of the funds be not delegated to any one member of a board.

As to the second, there have been many *cy pres* proceedings. I mention two or three of interest.

Charles A. Reade Fund.

Experience of a long period of years in effort to carry out literally the desires of the donor for scientific lectures demonstrated such insufficient interest and consequent impracticable use of the fund that, through proceedings initiated by the Attorney General, supported by the officials of the city of Salem, a decree was entered by the Superior Court of the County of Essex allowing the income of this fund for free musical concerts, with scientific features, for the inhabitants of the city of Salem. Radio broadcast of the first concert enabled other citizens of Massachusetts to share the benefits of this gift.

Massachusetts Total Abstinence Society.

Proceedings have been commenced for application of the funds of this society, a charitable corporation, idle through death of interested leaders and other incidents.

National Sailors' Home.

The trustees of this home, a charitable corporation, which for sixty years has maintained a home in Quincy for former members of the United States Navy, sought permission of the Supreme Judicial Court to discontinue maintenance of any home and to utilize the funds at their disposal in other modes. The allowance of this petition was opposed by the Attorney General in the belief that the need for such an institution in our Commonwealth had not ceased. Continuance of this home for our sailors, provision for more suitable facilities, and readjustment of the personnel of the board, with added representation for naval veterans, are the present endeavors of the Attorney General.

5. Estates under Public Administration.

As estates wherein there are no heirs are payable to the Treasurer of the Commonwealth (G. L., c. 190, § 3, cl. 17), the State is a party in interest, occasioning supervision by the Attorney General over public administrators in investigation and approval of their accounts and appearance in courts in determination of genuineness of alleged heirship of those claiming estates.

In a current case, through the action of this department, a claimant to an estate was found guilty of perjury in the jurisdiction in which he dwelt, with subsequent sentence of imprisonment.

6. Proceedings to enforce the Regulations of the Department of Public Safety.

G. L., c. 148, § 26, requires the Attorney General to enforce regulations of the Department of Public Safety relative to blasting with explosives.

Consequent to certain regulations of the Department of Public Safety, proceeding is now pending in the Superior Court for the County of Essex for prevention of certain blasting operations alleged to be to the detriment of the inhabitants of the town of Swampscott.

7. Service to Special Recess Commissions: Special Reports.

Assistant Attorney General Cutter assisted the Special Recess Tax Commission in the legal work connected with its duties, and devoted much of several months to this work.

At my designation, Assistant Attorney General Callahan served as a member of the Special Recess Commission to study Laws relating to Plumbing (Res. 1929, c. 16) and of the Commission to survey and revise the Game and Inland Fish Laws (Res. 1929, c. 34).

The investigations, requested by the General Court, as to certain claims (Res. 1929, c. 46) and as to removal, repair and maintenance of bridges over certain locations of the Southern New England Railroad Corporation and former location of the Hampden Railroad Corporation (Res. 1929, c. 42) were conducted by Assistant Attorney General Simoneau, designated by me as authorized in the resolves.

8. Industrial Accident Cases; Proceedings against the Commonwealth under the Provisions of G. L., c. 30; Approval of Contracts and Titles.

The department represented the Commonwealth at 18 hearings before the Industrial Accident Board and at 6 conferences in cases arising under the Workmen's Compensation Act (G. L., c. 152), providing for compensation to laborers, workmen and mechanics employed by the Commonwealth, who receive personal injuries arising out of and in the course of their employment.

The department also prepared or passed upon 475 contracts as to form; 29 leases, 5 easements; and 185 deeds as to both legal form and title.

Under G. L., c. 30 § 39, as amended, relating to certain liens against security for the construction of public works, 10 cases have been concluded and 12 are still pending.

9. Corrupt Practices.

Either at the relation of the Secretary of State, for non-observance of law in the filing with him of returns relative to elections, or upon representation of other parties claiming such violations, the activities of certain persons and organizations with reference to corrupt practices in elections, other than in cities or towns, were investigated. One investigation, after prosecution, resulted in the imposition of a penalty of $1,000 on a certain company for expenditure of moneys contrary to the law, and a less penalty on a defendant treasurer of an organization, working in conjunction with that company, for causing an incorrect return to be filed.

10. Opinions.

Opinions of interest are annexed.

IV. CERTAIN CONSTITUTIONAL FUNCTIONS REQUIRED OF THE ATTORNEY GENERAL IN PERSON.

Initiative Measures.

The time for filing initiative measures with the Secretary of State begins on the first Wednesday of a September and ends with the first Wednesday of a following December. Before a measure may be so filed it must first be presented to the Attorney General and be certified by him as in proper form, as not containing anything excluded from initiatives by the Constitution and correct in certain other respects. Upon presentation to him, petitioners may require him to act, — either to certify or to refuse to certify, — or, with his permission, withdraw the measure. Upon a certification, parties opposed to a measure may bring proceedings in an attempt to quash the Attorney General's certificate and to prevent the Secretary of State from printing blanks for additional signatures. Upon a refusal to certify, if petitioners feel refusal is arbitrary and that the proposed measure is in fact within the Constitution, they have equal right to bring proceedings to force him to certify. As the date for filing measures with the Secretary of State begins the first Wednesday of a September, it behooves petitioners, if they expect benefit of the full period of the succeeding ninety days allotted in the Constitution for the obtaining of signatures, to present proposed initiatives before and not after the day when the ninety days have begun to run. Subjected, as he may be, to review by the Supreme Judicial Court for any errors in certification, the responsibility of the Attorney General is too great for hurried consideration of measures, frequently covering many typewritten pages.

There were seventeen initiatives presented this year relating to five different subjects: one to strike out G. L., c. 138, § 2A (the so-called "Baby Volstead"); one to prohibit certain steel traps; six to set up a

State fund for automobile insurance; three to add to the Public Bequest Fund; and six to set up a workmen's compensation fund.

Of the seventeen measures presented, four were certified; four were withdrawn [three by Mr. Frank A. Goodwin and others to establish a fund for automobile compulsory insurance and one by the American Federation of Labor (Massachusetts branch) to establish a workmen's compensation fund]. The Attorney General refused to certify the other nine, and assigned reasons therefor.

Measures Certified.

1. The initiative containing the following measure: "Chapter 138 of the General Laws is hereby amended by striking out section 2A, inserted by chapter 370 of the Acts of 1923," certified September 4. Section 2A forbids — unless in each instance with permit or other authority required therefor by the laws of the United States and the regulations made thereunder — the (1) manufacture; (2) transportation by (*a*) air craft, (*b*) water craft or (*c*) vehicle; (3) importation or (4) exportation of spirituous or intoxicating liquor, namely, (1) beverages containing more than $2\frac{3}{4}$ per cent of alcohol by weight at 60° Fahrenheit; (2) distilled spirits; and (3) certain non-intoxicating beverages, namely, those containing not less than $\frac{1}{2}$ and not more than $2\frac{3}{4}$ per cent of alcohol by weight at 60° Fahrenheit.

2. The initiative, presented September 16 and certified September 24, contained a measure to amend G. L., c. 131, by inserting a new section numbered 59A, which related to the use of traps for capture of certain fur-bearing animals.

3. The fourth petition of Mr. Goodwin and others, presented October 28 and certified November 1. Three preceding petitions, presented by the same petitioner and others, were withdrawn. The first petition was presented September 23 and withdrawn October 2; the next, presented October 7, was withdrawn October 16, and the third, October 23.

4. The fourth petition of the American Federation of Labor, "An Act to establish a fund for workmen's compensation," presented November 27 and certified November 29. Of its three prior petitions, the Attorney General refused to certify the first on September 5; on the second, presented more than seven weeks later (October 29), petitioners requested at a hearing on November 1 no action be taken; the third, presented two weeks later (November 19), the Attorney General refused to certify on November 21, and assigned reasons.

Uncertified Measures.

Two petitions (purporting to contain measures to create a State fund under the administration of a commission for the compulsory insurance of motor vehicles registered in the Commonwealth); the first (presented

September 19) was refused September 25; the second (presented October 29), refused October 31; with reasons assigned therefor.

Three (purporting to contain measures to provide "that certain money escheating to the Commonwealth shall be added to the so-called Public Bequest Fund"); the first (presented July 31) was refused September 9; the second (presented October 17) was refused October 18; the third (presented October 29) was refused October 30; with reasons assigned therefor.

Two (purporting to establish a workmen's compensation fund) by petitioners other than the American Federation of Labor were refused, with reasons.

Descriptions of the measures certified were furnished to the Secretary of State by the Attorney General after petitioners had filed them with the Secretary, for, as pointed out in *Brooks* v. *Secretary of State*, 257 Mass. 91, a description is "not made until *after*" a petition is filed.

Petitions for mandamus against the Secretary of State and for certiorari to quash the certificate of the Attorney General were brought November 3 to prevent the transmission to the Legislature of the certified initiative measure (the fourth petition of Mr. Goodwin) for the establishment of a State fund for automobile insurance.[1]

V. GENERAL OBSERVATIONS.

1. Power of Attorney General relative to Investigations.

In my last report I pointed out that the Attorney General has no power in any independent inquiry to summon witnesses and examine them under oath for the ascertainment of facts to effect thorough investigation of matters, civil as well as criminal, concerning the public peace, public safety and public welfare, with responsibility for which he is popularly charged. I renew recommendation for grant of such power, if such investigations are desired.

2. Recording Automobile Conditional Sales to avoid Futile Litigation.

I renew my suggestion that conditional sales of motor vehicles be recorded with the Registrar of Motor Vehicles. I believe that litigation resulting from disputes with reference to ownership, sales, attachments and liens, by resort to a central office, can be minimized.

3. Continuation of Commission Studying Proceedings relative to Children and Domestic Relations.

In my last report I recommended the appointment of a commission to make a thorough study of these matters. Such a commission was appointed. The work has proved too extensive for a final report. I recommend that it be continued.

[1] The Supreme Judicial Court sustained the action of the Attorney General as this report goes to press.

4. Continued Study of General Tax Revision.

The Special Recess Commission on Taxation has prepared an exhaustive report dealing mainly with the major problems now arising in connection with State taxation. With the general policies of taxation this department has nothing to do, but its work is much affected by provisions in the structure of the statute law concerning taxation, voluminous, interrelated and intricate. Comprehensive revision demands long and careful study. I favor its continuance.

5. For a New Board of Tax Appeals.

One portion of the very comprehensive report of the 1929 Special Recess Tax Commission has a very definite relation to the work of the Attorney General as representing the Commissioner of Corporations and Taxation in litigated matters of taxation. The commission proposes the establishment of a board of tax appeals, consisting of three members appointed by the Governor with the consent of the Council, solely on the basis of their qualification to perform their duties. At present, appeals from the decisions of the Commissioner of Corporations and Taxation are heard either by one of the many courts of the Commonwealth (depending upon the nature of the tax) or by the board of appeals from decisions of the Commissioner of Corporations and Taxation. That board consists of three State officers, who have many other heavy administrative duties to perform for the Commonwealth. A board of tax appeals should be an impartial body; there should be no possibility that any citizen seeking a tax abatement could have any feeling that the board is biased in favor of the Commonwealth. With State officials, having other duties to perform for the Commonwealth, acting as members, this possibility is not wholly absent, although an examination of the statistics of cases decided by the present board shows that the board has granted abatements about as frequently as it has denied them.

The tax laws of Massachusetts are growing in volume and in complexity. This is probably the inevitable result of the complicated structure of modern business and of the economic life of the community. Problems of taxation are now dealt with principally by specialists, and a board of tax appeals should be composed not only of persons who are tax specialists but of members who have a very thorough business and legal training. There is absolutely no certainty that any one of the three gentlemen who serves upon the present board *ex officio* will be a lawyer, and even less certainty that he will have a specialized knowledge of the Massachusetts tax statutes. I hope this proposal will receive favorable consideration.

6. Just Provisions to relieve Motor Vehicle Owners by Amendment to the New Motor Vehicle Excise Tax Law.

The administration of the new motor vehicle excise (G. L., c. 60A), which supplants the old local personal property tax upon motor vehicles, has resulted in much recourse to this department, particularly with respect to those provisions relating to persons who transfer motor vehicles during the calendar year.

This law should be amended —

(1) To make it certain that the year of actual manufacture or assembling of the motor vehicle is taken as the year upon which the value of the privilege taxes is measured.

(2) To provide a fair abatement of the tax paid early in the year by one who transfers or turns in his car during the year.

At my direction, such suggestions were presented to the Special Recess Tax Commission, and I hope such remedial amendments will be favored.

In passing, I must commend Mr. Henry F. Long, Commissioner of Corporations and Taxation, who, by a very liberal and sensible construction of the provisions of G. L., c. 60A, in his departmental regulations, averted litigation which otherwise would have arisen under this statute.

7. Readjustment in State Taxation of National Banks.

The 6–3 decision of the Supreme Court of the United States in the Macallen case (*supra*), in which this office represented the Commonwealth, was a blow to the method now in force in Massachusetts of taxing national banks, as well as in the States of California, Oregon and New York. The case itself did not involve a national bank, but dealt with the taxation of a domestic business corporation, part of the excise upon which was measured in much the way that the excise upon national banks is measured. The court held that the excise was invalid to the extent that it was measured by the net income derived from tax-exempt Federal and State obligations.

By a parity of reasoning, the excise levied upon national banks would likewise be held invalid. Inasmuch as a very large proportion of the gross income of national banks is derived from tax-exempt bonds, the loss to the State tax revenue will be materially greater. The situation will be in part obviated if the Legislature adopts the recommendations for the taxation of corporations and banks about to be presented to the General Court by the Special Recess Tax Commission.

Any substantial increase in the amount of revenue obtained by the States from the taxation of national banks can come only through an amendment of the act of Congress under the authority of which the States are permitted to impose excises upon national banks. (U. S. Rev. Stat. § 5219.)

It is generally conceded by authorities on constitutional law, and by tax lawyers who have studied the question, that the solution of the national bank tax problem by legislation, adopted by Massachusetts in 1925 and by California, New York and Oregon at a later date, is definitely overturned by the Macallen case. The States must give up any thought of increasing the amount of revenue received from national banks through the inclusion of interest from tax-exempt bonds within the gross income of the banks upon which the net income measure of the excise is computed. Those who are studying the question are directing their efforts towards obtaining a new solution of the problem.

It is hoped that some arrangement, agreed to both by the banks and by the interested States, may be reached for a bill to be presented to Congress which has the approval of all parties to the controversy. In the meantime, and in the event such amendments are presented, the members of Congress from this Commonwealth should be apprised of the exigency confronting this State and the attitude of the legislative bodies with respect thereto solemnly expressed.

8. Vigilance in Safeguarding State Probate Practice and State Banks from Federal Encroachment.

The decision of the Supreme Court of the United States in the case of *Ex parte Worcester County National Bank*, elsewhere referred to in this report, raises an interesting question of the relation between the powers of the Federal government to forward the interests of its fiscal agencies, the national banks, and the powers of the States with respect to the administration of estates in their probate courts.

It seems altogether likely that, in these days of governmental encouragement of bank consolidations, particularly at a time when the Federal government is doing all that lies within its power to encourage consolidations under national bank charters, further attempts will be made by Congress to give trust powers to national banks which will tend to infringe upon the power of the probate courts of the Commonwealth to control in every detail the administration of decedents' estates.

If Congress further relieves national banks, doing trust business, from the control of State probate courts with respect to such trust business, it will result not only in an interference with the proper operation of the probate courts, but will tend to give to national banks a distinct advantage in competition with State banks and trust companies doing a similar trust business.

How far Congress has constitutional power to relieve national banks, acting as trustees under State court appointments, from State court regulation is still perhaps an open question. The *Worcester County National Bank* case (279 U. S. 379) leaves the point undecided. It would seem, however, that the eagerness on the part of national banking author-

ities that consolidations take place without complicated transfers should not be allowed to outweigh the important principle, laid down in this Commonwealth from the earliest times, that the estates of deceased persons within this Commonwealth are to be administered under the most rigid court supervision, so that the interests of widows and orphans in the estates of their relatives may be fully protected from careless, negligent, or dishonest administration. Consolidations unquestionably must take place. Banks should be free to consolidate under national charters under easy and simple provisions of statute law. It is perfectly possible, however, to permit them to do this and at the same time leave to the probate courts fully as complete control of the estates in which banks that are parties to a consolidation are acting in fiduciary capacities as the court has over any other estate.

I suggest, therefore, that every new legislative proposal introduced into Congress be carefully inspected to make sure that the powers of the State over its probate courts are not interfered with in any embarrassing manner.

9. Greater Recourse by the Courts to Commitments for Treatment of Drug Addicts than Use of Imposition of Penalties.

The disposition of drug addicts has, indeed, as much a medical aspect as a criminal one. Sentence and fine do not correct offenders; witness, invariable repetition. I advocate use by the courts of provisions enacted in 1909 (c. 504) for commitment for treatment rather than first use of sentence and fine.

10. Greater Recourse by the Courts to Psychiatric Information in Civil as well as Criminal Proceedings afforded by Present Provisions of Law.

G. L., c. 123, § 99, authorizes any court to request the Department of Mental Diseases to assign a member of a State hospital medical staff to make a mental examination "of any person coming before any court." No fee is chargeable under this section. Although, under this provision, service may be rendered not only to the criminal but to the probate and civil courts, only 23 cases were referred to the Department of Mental Diseases in 1929. Its purpose was to enable courts to determine the mental condition of persons coming before them. Recourse to such service, available and free, would give added assurance against penal commitment of persons suffering from mental disease or defect, as well as added assurance of treatment for the mental trouble which caused the commission of the offense rather than imprisonment for a stated period of time, effecting no cure. Provision for psychiatrists, designated to serve the courts in defined districts, is worthy of consideration.

11. Provision assuring Availability to the Court, before Trial or Disposition of Capital Cases and Second Offenses, of Psychiatric Information now by Law required to be filed in Court by the Department of Mental Diseases.

Whenever a person is indicted by a grand jury for a capital offense, or for any offense more than once, or has been previously convicted of felony (G. L., c. 123, § 100A; St. 1921, c. 415), notice is given to the Department of Mental Diseases, which, after examination, — had to determine mental condition or defect affecting criminal responsibility, — files a report with the clerk of the trial court. There is no requirement as to time for making such examination, or for filing such report, or for contingency of trial and disposition upon such report. About 21½ per cent of the total number of persons examined under these provisions since 1921 was found to have mental conditions affecting criminal responsibility. If eight years of psychiatric examination has shown that penal restraints could not affect the reform or correction of one-fifth of capital and second offenders, future dispositions should be aided by a positive requirement that such examinations should be made and report thereon be available to the court at the earliest possible moment.

12. Consideration of Measures enabling Property Damage Insurance, to obviate Claims therefor under the Guise of Claims for Personal Injuries, and providing Protection for Injured Persons in Cases of Insolvency of Insurers of Persons Liable to Such Injured Persons.

Irrespective of the extent to which claims for personal injuries are made as a result of automobile collisions, where no actual personal injuries have been suffered and the claims are put forward merely for the purpose of recovering from an insurance company an amount sufficient to cover the property damage sustained by the claimant's automobile, many such false claims would be obviated by requiring the statutory form of compulsory automobile liability policy to cover property damage as well as personal injury. In so far as this may be accomplished and rates fixed upon an accurate basis, I suggest its consideration.

The insolvency or bankruptcy of insurance companies carrying compulsory automobile insurance leaves the very persons, who by the statute were intended to be adequately protected, without protection. I favor legislation designed to afford protection to such persons, whereby there may be solvent resources from which they may be indemnified when injured by automobiles.

13. Regulation of "Overnight" Camps.

I renew my recommendation of last year for general legislation regulating "overnight" camps in registration of guests for identification purposes.

14. Literary and Dramatic Censorship.

Last year I called attention to the general unrest within the Commonwealth over the method of censoring literary and dramatic productions, and suggested that a special recess commission, with representation from all groups interested in the subject, be appointed to investigate the whole situation. In view of the fact that the unrest to which I referred last year has not in any way diminished, but on the contrary has considerably increased, I renew this recommendation.

The principal change in the law sought by those advocating a modification of the so-called censorship provisions of the General Laws deals with G. L., c. 272, § 28, which reads in part:

> Whoever imports, prints, publishes, sells or distributes a book, pamphlet, ballad, printed paper or other thing *containing* obscene, indecent or impure language, . . . shall be punished . . .

A bill has been proposed which recommends that the word "containing" be changed to "which considered as a whole is."

The idea of any amendment of G. L., c. 272, § 28, is to make sure that books, for the sale of which persons shall become subject to trial on criminal charges, should be judged not by any isolated passage, as under the present law, but by the effect and tendency of the book as a whole to corrupt the morals of the community. I believe that some such change in the statute should be enacted. The precise wording of any amendment is purely a legislative problem. I believe that a book which is really objectionable would be as effectively banned under the proposed amendment, as under the present law.

Anything which savors of censorship calls for a rather nice adjustment between the desire to have complete freedom of the press, in accordance with our constitutional traditions, and the desire to protect the morals of youth from contaminating influences. Probably no statute will ever be framed which will by its own terms establish a hard and fast definition of obscenity applicable to all possible cases which may come before the courts.

All that such a statute can lay down is a standard of reasonable conduct. An alleged violation of such standard will be determined in view of all the circumstances surrounding any particular case. My thought is that a solution of this perplexing problem, affecting, as it does, literature and art, publishers, booksellers, the press, the theatre, the public library, science and medicine, the church and the public, can be appropriately reached only by a most careful study of the situation, undertaken in an intelligent spirit of co-operation and forbearance.

15. Suggestion that "False Swearing" be a Misdemeanor obviating Necessity of Proof of Materiality of Testimony Necessary in Prosecution for Perjury.

G. L., c. 268, § 1, defines perjury. Materiality of the testimony is an essential element of the crime. It must be proved. Prevarication in testimony in trials is not easily met by this provision for prosecution of perjury. Whether or not the testimony be material to the issue, it should be the truth. I suggest consideration of enactment of a law that "a person who in a proceeding in the course of justice, wherein he is lawfully required to depose the truth, wilfully and knowingly testifies or certifies falsely in regard to any matter or states in his testimony any matter to be true which he knows to be false, shall be guilty of a misdemeanor, namely, false swearing."

16. Enabling Measures for Local Police Forces.

In the enforcement of law, dependent upon many agencies as they relate to its many aspects, namely, detection, apprehension, prosecution, correction and prevention of crime, local police are the "first line."

Criticism should not be hasty until an urban community has itself first made provision for its competent discharge in meeting increasing exactions of the day. Voluntary efforts for self improvement and the merit of local police service call for encouragement, either by legislation or by provision in municipalities, as may be best designed to effect it; for instruction, with tests in all phases of modern-day, active police work, either by attendance at a school or by a local or district instructor; for a numerical force sufficient to protect a community properly, considering population, territory and incidents; for standardization of pay; for uniformity in providing personal equipment; for quarters, respectable and dignified; and for installation of latest devices for intrastate and interstate contacts.

17. New Court House.

I add my solicitation for construction of a new Court House in Boston, a vital and necessary factor for furtherance of the general administration of justice.

18. Greater Protection of Poultry Owners against Thieves.

The penalty for breaking and entering, with intent to commit larceny, or for entering without breaking any building or enclosure kept for poultry is a fine of *not more* than $500 or imprisonment in the house of correction for *not more* than two years. (G. L., c. 266, § 22.) I advocate the naming of a specific minimum penalty, and suggest consideration of measures regulating by license those dealing with poultry owners, and the transportation of poultry over highways between sunset and sunrise. The

heavy losses, estimated at $40,000, this year, emphasize the urgency of consideration of measures for greater protection of poultry owners from thieves.

19. For the Protection of the Commonwealth against Liability for Injuries or Damages in Construction of Ways, not State Highways, authorized by Special Acts.

G. L., c. 81, § 18, provides that the Commonwealth shall not be liable for injuries sustained by travelers caused by State highway defects "during the construction, reconstruction or repair of a state highway." Occasionally, special acts authorize the Department of Public Works to construct ways not laid out as State highways. To remove all question of liability of the Commonwealth for injury or damages during such construction, either the special acts should in each case be so worded that the general provision remains clearly applicable to the particular way, or a new section in G. L., c. 81, be enacted, to the effect that the Commonwealth shall not be liable for any injury or damages sustained during the construction, reconstruction or repair of any way for the construction, improvement or repair of which money has been appropriated by the General Court.

20. To minimize Litigation arising out of Petitions for Access, for Commercial Uses, to Premises abutting Metropolitan Boulevards.

The Metropolitan Parks System was intended to combine the features of health, recreation and beauty with opportunities for safe and unimpeded use by the traveling public not inconsistent therewith.

Demands for the development of property abutting the boulevards for business uses effecting consequences which the Commission deemed inconsistent with the design of the system, have resulted and will result in much controversy and litigation for direct access to the boulevards, even in cases of access already existing from the same properties to the same boulevards, on side streets.

If the same powers to regulate the use of abutting property, as are enjoyed by local municipal authorities, were vested in the Commission, recourse to adjudication by the courts would be minimized, and I suggest its consideration.

21. Supervision of Foreign Charitable Corporations.

To engage in charity, all one has to do is to start collecting. Any individual, or group of individuals, or society, or unincorporated organization may collect for or conduct a charity without any regulation by law. Any seven or more, if a majority be inhabitants of this Commonwealth, may petition to become a charitable corporation, under G. L., c. 180, § 1. If so incorporated and the personal property of the corpora-

tion is such as that recited in the statute (G. L., c. 180, § 12), whereby it is exempt from taxation, written report to the Department of Public Welfare is required, showing purpose, receipts and expenditures, whole and average number of beneficiaries, and such other information as the department may require. This is the State's sole provision for statutory control over persons conducting charities. If incorporated as a "church," even this provision does not apply. An organization, incorporated under the laws of another State, may engage in charity work in this Commonwealth without any regulation or supervision whatever.

Inquiries by this department into certain "charities" disclosed that their "workers" or collectors received half the alms and the "cause" whatever remained after the cost of "support" of the "organization." How common this practice may be I do not know. I hesitate to recommend enactment of laws encroaching upon personal freedom to engage in the relief of humanity, and thus impose upon worthy charities regulations designed to correct its abuse by unscrupulous persons who themselves appear to be the principal recipients of "relief." However, there is no reason why foreign charitable corporations should not be subject to the same laws as our own, and I recommend legislation effecting this.

22. Determination of Policy as to whether Certain Expenses incurred in Extradition Proceedings shall be borne by the Commonwealth or by the Particular County in Behalf of which a District Attorney applies to the Governor that he demand the Executive Authority of Another State to return Fugitive.

Traveling expenses of district attorneys and their assistants, except in Suffolk County, are payable by the Commonwealth. (G. L., c. 12, § 23.) Expenses of any agent appointed, after application for the arrest of a fugitive is complied with, are payable by the county where the proceedings are pending, or in whole or in part by the Commonwealth, as the Governor may direct. (G. L., c. 276, § 15.) Frequently an assistant attorney general furthers the demand of the Governor in proceedings in other States, both in hearings before Executive authorities and before courts. Though such service is rendered in presentation of the Governor's demand, yet in fact it is performed for the county for which demand was made. It should be determined by the General Court whether expenses so incurred are hereafter to be payable by the county or by the Commonwealth.

23. Publication of Another Volume of the Opinions of the Attorneys General.

In my judgment, there is sufficient public interest to warrant the publication of Volume VIII of the Opinions of the Attorneys General.

I recommend appropriation of a sufficient sum of money for this purpose.

24. Uniform Laws.

I favor earnest consideration of all measures proposed by the Commission for Uniform State Laws, especially those with regard to crime and extradition.

CONCLUSION.

The foregoing record notes but a few of the varied and comprehensive services of this department, too numerous even to list, which statutes yearly supplement. And as to such services, only those particular matters are mentioned as are thought informative.

To the zeal, assiduity and ability of the Assistant Attorneys General, individually and collectively, and to the competency and fidelity of all the members of the office staff, the Attorney General acknowledges the accomplishments of the administration of the department.

Respectfully submitted,

JOSEPH E. WARNER,
Attorney General.

DETAILS.

1. Disposition of indictments pending Nov. 30, 1928:

Northern District (in charge of District Attorney Robert T. Bushnell).

Frederick Hinman Knowlton, Jr.

Indicted in Middlesex County, April, 1928, for murder of Marguerite Isabelle Stewart, at Concord, on March 30, 1928; arraigned April 11, 1928, and pleaded not guilty; trial June, 1928; verdict of guilty of murder in the first degree; motions for new trial denied and exceptions overruled; sentence thereupon; carried out May 14, 1929.

Eastern District (Essex County cases: in charge of District Attorney William G. Clark).

George Metaxatos.

Indicted September, 1927, for murder of Hassen Abrams, at Peabody, on Feb. 17, 1927; arraigned Oct. 4, 1927, and pleaded not guilty; trial February, 1928; verdict of guilty of murder in the second degree; motion for new trial filed and allowed Feb. 28, 1928; *nolle prosequi* Dec. 3, 1928.

George Elmer Harrison Taylor, *alias*.

Indicted September, 1927, for the murder of Stella Pomkala, at Salisbury, on June 5, 1927; arraigned Oct. 4, 1927, and pleaded not guilty; trial October, 1927; verdict of guilty of murder in the first degree; motions for new trial, claim of appeal and assignments of error denied; sentenced on Jan. 25, 1929; carried out March 6, 1929.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Mary E. Fitzgibbons.

Indicted May, 1928, for the murder of Eleazar G. Saunders on April 21, 1928; arraigned Dec. 4, 1928, and pleaded not guilty; trial February, 1929; verdict of not guilty by reason of insanity; committed to the Boston State Hospital for life.

Harry Lamb and Ung Hong Yen, *alias*.

Indicted November, 1928, for the murder of Ley Wey Kin on Oct. 16, 1928; arraigned Jan. 7, 1929, and pleaded not guilty; trial February, 1929; verdict of not guilty as to each defendant.

Antonio Selvitella.

Indicted June, 1928, for the murder of Santa Zona on April 20, 1928; arraigned Feb. 4, 1929, and pleaded not guilty; trial February, 1929, during which he retracted former plea and pleaded guilty to murder in the second degree, which was accepted; defendant thereupon sentenced to State Prison for life.

Charles Trippi, *alias*.

Indicted November, 1928, for the murder of Frederick Pfluger on Nov. 11, 1928; arraigned Nov. 15, 1928, and pleaded not guilty; trial January, 1929; verdict of guilty of murder in the first degree; defendant's claim of appeal and assignments of error denied July 1, 1929; sentenced Sept. 13, 1929; Nov. 14, 1929, respite of execution of sentence to and including Nov. 29, 1929, granted by the Governor and Council; sentence carried out Dec. 3, 1929.

Middle District (in charge of District Attorney Charles B. Rugg).

Joseph R. Dogil.

Indicted in Worcester County, October, 1928, for the murder of Cosimo Milyaro, at Clinton, on Dec. 1, 1928; placed on file by order of the court May 28, 1929, as defendant then serving sentence of not less than eighteen years nor more than twenty-five years for robbery.

Southern District (in charge of District Attorney William C. Crossley).

Henri LeBrun, *alias*.

Indicted in Bristol County, November, 1928, for the murder of Thomas Campeau; arraigned Nov. 21, 1928, and pleaded not guilty; retraction of former plea, and plea of guilty to manslaughter accepted by the Commonwealth Feb. 13, 1929; sentence thereupon to State Prison for not less than seven years nor more than ten years.

2. Indictments found and dispositions since Nov. 30, 1928:

Northern District (Middlesex County cases: in charge of District Attorney Robert T. Bushnell).

Arthur J. Manning.

Indicted January, 1929, for the murder of Mary A. Lee, at Somerville, on Dec. 23, 1928; arraigned Jan. 11, 1929, and pleaded not guilty; defendant retracted former plea and pleaded guilty to simple assault, April 15, 1929; plea accepted; sentence thereupon to the house of correction at Cambridge for the term of fifteen months.

John Onashuck.

Indicted June, 1929, for the murder of Walter Popluski, at Cambridge, on May 30, 1929; arraigned June 5, 1929, and pleaded not guilty; defendant retracted former plea and pleaded guilty to simple assault, June 12, 1929; plea accepted; sentence thereupon to the house of correction at Cambridge for the term of one year.

Thomas J. Panetta.

Indicted June, 1929, for the murder of Dominick Simonetti, at Cambridge, on May 30, 1929; arraigned June 5, 1929, and pleaded not guilty; retracted former plea and pleaded guilty to manslaughter, June 19, 1929; plea accepted; sentence thereupon to State Prison for a term of not less than twelve years and not more than twenty years.

John J. Sheehan.

Indicted September, 1929, for the murder of Patrick McGagh, at Lowell, on July 22, 1929; arraigned Sept. 5, 1929, and pleaded not guilty; trial December, 1929, verdict of not guilty by reason of insanity; thereupon committed to the Danvers State Hospital for life.

Suffolk District (in charge of District Attorney William J. Foley).

George W. Taylor.

Indicted in Suffolk County, May, 1929, for the murder of James Talbot on April 7, 1929; arraigned May 29, 1929, and pleaded not guilty; retracted former plea and pleaded guilty to manslaughter, Oct. 15, 1929; plea accepted; sentence thereupon to State Prison for not more than ten years and not less than seven years.

Southeastern District (Norfolk County cases: in charge of District Attorney Winfield M. Wilbar).

Joseph Bellamo and Jerry Bellamo, *alias*.

Indicted April, 1929, for the murder of Peter Terrazzini, at Needham, on Jan. 29, 1929; Joseph Bellamo arraigned Dec. 13, 1929, and pleaded guilty to manslaughter; plea accepted; sentence thereupon to State Prison for a term of not less than twelve years and not more than fifteen years; Jerry Bellamo discharged by the court at the suggestion of the District Attorney, Dec. 13, 1929.

Octave Robillard.

Indicted December, 1928, for the murder of Loretta Froment, at Bellingham, on Sept. 21, 1928; arraigned April 1, 1929, and pleaded not guilty; retracted former plea and pleaded guilty to murder in the second degree, April 25, 1929; plea accepted; sentence thereupon to State Prison for life.

Middle District (Worcester County cases: in charge of District Attorney Charles B. Rugg).

Thomas Cooper.

Indicted May, 1929, for the murder of Eliza Jane Brown, at Lunenburg, on Sept. 4, 1928, and for the murder of William Stuart, at said Lunenburg, on Oct. 11, 1928; arraigned Aug. 26, 1929, and pleaded not guilty to both counts; retracted former plea and pleaded guilty to manslaughter on both counts, Nov. 6, 1929; plea accepted; thereupon sentence on each count to two years in the house of correction at Worcester.

Annie Kondrot, *alias*.

Indicted October, 1929, for the murder of Ellen Kondrot and Lillian Japalowski, at Worcester, on Sept. 28, 1929; found insane by the court Nov. 5, 1929; thereupon committed to the Worcester State Hospital.

3. Pending indictments and status:

Northwestern District (in charge of District Attorney Charles Fairhurst).

Charles Macules, *alias*.

Indicted in Hampshire County, February, 1929, for the murder of George Chepules, at Amherst, on Dec. 20, 1928; arraigned Feb. 25, 1929, and pleaded not guilty; committed to the Bridgewater State Hospital for observation, May 1, 1929.

Eastern District (in charge of District Attorney William G. Clark).

George Breton.

Indicted in Essex County, June, 1929, for the murder of Caroline Breton, at Methuen, on June 7, 1929; arraigned June 17, 1929, and pleaded not guilty; committed to the Danvers State Hospital for observation, Oct. 7, 1929.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

Rocco Cassaro, and Carmelo Garufo as accessory before the fact.

Indicted November, 1929, for the murder of Salvatore Alabiso on Oct. 27, 1929; not yet arraigned; defendants' motions pending.

Gangi Cero.

Indicted June, 1927, for the murder of Joseph Fantasia on June 11, 1927; arraigned July 6, 1927, and pleaded not guilty; trial November, 1927; verdict of guilty of murder in the first degree; motion for new trial and assignments of error, and claim of appeal and assignments of error denied; thereupon sentenced to death by electrocution during the week beginning Nov. 4, 1928; respites of execution of sentence to Dec. 9, 1928, Jan. 8, 1929, Feb. 7, 1929, and April 8, 1929, granted by the Governor and Council; motion for new trial on the ground of newly discovered evidence allowed March 22, 1929.

James F. Doyle.

Indicted March, 1929, for the murder of Mary F. Doyle on Feb. 11, 1929; adjudged insane and committed to the Bridgewater State Hospital.

Samuel Gallo.

Indicted January, 1929, for the murder of Joseph Fantasia on June 11, 1927; arraigned Jan. 11, 1929, and pleaded not guilty; trial February, 1929; verdict of guilty of murder in the first degree; motion for new trial allowed March 22, 1929.

Leong Sang, *alias*, and Ung Hong Yun, *alias*, as accessory before the fact.

Indicted August, 1929, for the murder of Yee Toon Wah on Aug. 5, 1929, Sang arraigned Sept. 5, 1929, and pleaded not guilty; Yun arraigned Aug. 12; 1929, and pleaded not guilty.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Wallace Allan Graham.

Indicted in Norfolk County, December, 1928, for the murder of Janet Graham, at Quincy, on Sept. 9, 1928; arraigned April 16, 1929, and pleaded not guilty; committed to the Bridgewater State Hospital for observation, April 16, 1929.

Christopher E. Cullen.

Indicted in Plymouth County, February, 1929, for the murder of Cora J. Cullen, at Hingham, on Jan. 25, 1929; arraigned March 14, 1929, and pleaded not guilty; committed to the Bridgewater State Hospital for observation, April 17, 1929.

OPINIONS.

Voting — Public Policy Act — Instructions to Legislators.

A vote upon a question of public policy relating to the repeal of the Eighteenth Amendment to the Constitution of the United States is governed by G. L., c. 53, §§ 19–22, as amended.

If such a question receives a majority of all the ballots cast at the election in which it is voted upon, and a majority of the ballots actually cast in relation to the particular question are in the affirmative, the result is to be construed as an instruction to a member of the Legislature.

DEC. 1, 1928.

His Excellency the Governor, and the Honorable Council.

GENTLEMEN: — From your recent communication to me I gather the following facts: At the State election held in November there was submitted to the voters in a senatorial district of this Commonwealth a question of public policy relating to the repeal of the Eighteenth Amendment to the Constitution of the United States. The vote thereon in that district resulted as follows: Affirmative votes, 18,242; negative votes, 11,320; other ballots cast by voters who did not vote on that particular question, 10,339 — making the total number of ballots cast in that district 39,901. You ask me whether G. L., c. 53, §§ 19–22, inclusive, apply to that particular question, and if so, whether the vote above described constitutes an instruction to the senator from that district.

Mass. Const., pt. 1st, art. XIX, is as follows: —

"The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

G. L., c. 53, § 19, as amended by St. 1925, c. 97, so far as material, is as follows: —

"On an application signed by twelve hundred voters in any senatorial district, . . . asking for the submission to the voters of that senatorial . . . district of any question of instructions to the senator . . . from that district, and stating the substance thereof, the attorney general shall upon request of the state secretary determine whether or not such question is one of public policy, and if such question is determined to be one of public policy, the state secretary and the attorney general shall draft it in such simple, unequivocal and adequate form as shall be deemed best suited for presentation upon the ballot. Upon the fulfilment of the requirements of this and the two following sections the state secretary shall place such question on the official ballot to be used in that senatorial . . . district at the next state election."

G. L., c. 53, §§ 20 and 21, deal only with the signing and filing of applications by registered voters, and have no bearing on the question asked by you.

G. L., c. 53, § 22, is as follows: —

"No vote under the three preceding sections shall be regarded as an instruction under article nineteen of the bill of rights of the constitution

of the commonwealth, unless the question submitted receives a majority of all the votes cast at that election."

The question of public policy relating to the repeal of the Eighteenth Amendment to the United States Constitution, which question is referred to in your letter, was the subject of litigation in our Supreme Judicial Court recently, and that court held, in the case of *Thompson* v. *Secretary of the Commonwealth*, 265 Mass. 16, in substance, that it was a question of instructions under G. L., c. 53, § 19, as amended by St. 1925, c. 97. In answer to the first part of your question, therefore, I am constrained to advise you that G. L., c. 53, §§ 19–22, inclusive, apply.

The next part of your question is, in substance, whether the result of the vote shown above is such as to constitute an instruction to the senator from the district in which the vote was had.

It is necessary under G. L., c. 53, § 22, in order that a vote shall be regarded as an instruction, that "the question submitted" shall receive a majority of all the votes cast at that election. I am of the opinion that by the phrase "a majority of all the votes cast at that election" the Legislature meant to say "a majority of all the ballots cast at that election." If the word "votes" were to be interpreted as meaning simply votes actually cast for or against the particular question, the section would be almost meaningless, because, except in the case of an actual tie vote, there would always be a majority one way or the other on the question submitted. I believe that the Legislature intended that a vote on a question of public policy should not be deemed an instruction to the senator unless at least fifty per cent of the voters who went to the polls in that district cast votes for or against the question. The number of voters who went to the polls in the senatorial district in question, as shown by the total number of ballots cast, was 39,901, and fifty per cent of that figure is 19,951. The total number of votes in that district, both affirmative and negative, which were cast on the question submitted, was 29,562, or more than a majority of all the ballots cast at the election. I am therefore of opinion that the vote in that district is to be "regarded as an instruction under article nineteen of the bill of rights of the constitution of the commonwealth," and inasmuch as the affirmative votes on the question were 18,242 and the negative votes were 11,320, I am of the opinion that the senator from that district was instructed to vote in favor of a resolution seeking the repeal of the Eighteenth Amendment to the Constitution of the United States.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Public Health — Consent of Department — Taking by Local Authorities — Water Supply.

The Department of Public Health is not limited to approving or disapproving a proposed taking as a whole, under G. L., c. 40, § 41, but it does not possess authority to limit such a taking to a specified time.

DEC. 3, 1928.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR: — You have requested my advice relative to proposed action by your Department under the provisions of G. L., c. 40, § 41.

You state in your letter to me as follows: —

"The water commissioners of the town of Weymouth, acting under the provisions of G. L., c. 40, § 41, have requested the approval by this Department of the purchase or taking by right of eminent domain, for the protection of the waters of Weymouth Great Pond, which is the water supply of the town of Weymouth, of certain parcels of land described in a vote taken at the annual town meeting held March 5, 1928.

. . . . . .

The Department, in accordance with the requirements of G. L., c. 40, § 41, gave a hearing upon the proposed taking, at its office, on November 20th, after notice.

It appears that, while the town has given the water commissioners authority to secure all of the lands in question, it is not the intention of the town authorities to acquire all of this land at the present time but to acquire only those lots which are likely soon to be developed for building or upon which buildings or structures exist which are a menace to the water supply or likely to become so. The region about Great Pond contains already a considerable number of dwelling houses, and it seems likely that the population will increase more or less rapidly in the future, the effect of which will inevitably cause deterioration in the quality of the water of Great Pond.

Considering the circumstances, the Department would probably be justified in approving the taking of the lands in question if they were to be taken at the present time. The question arises whether it is reasonable under the circumstances for the Department to approve the taking of these lands after having been advised that the takings may extend over a period of ten years, more or less.

A second question is: Has the Department authority to limit the takings to a specified date or within a specified period of years?

There is a third question, and that is: Whether the owner of a piece of land, the taking of which has been approved by this Department but not carried out by the town, can recover damages for injury to the land for the purposes of sale, provided damage can be proven?"

G. L., c. 40, § 41, is as follows: —

"Towns and water supply and fire districts duly established by law may, with the consent and approval of the department of public health, given after due notice and a hearing, take by eminent domain under chapter seventy-nine, or acquire by purchase or otherwise, and hold, lands, buildings, rights of way and easements within the watershed of any pond, stream, reservoir, well or other water used by them as a source of water supply, which said department may deem necessary to protect and preserve the purity of the water supply. All lands taken, purchased or otherwise acquired under this section shall be under the control of the board of water commissioners of the town or district acquiring the same, who shall manage and improve them in such manner as they shall deem for the best interest of the town or district. All damages to be paid by a town or district by reason of any act done under authority hereof may be paid out of the proceeds of the sale of any bonds authorized by law to be issued by such town or district for water supply purposes or from any surplus income of the water works available therefor. A town may also make a contract to contribute to the cost of building, by any other town situated in the watershed of its water supply, a sewer or system of sewers to aid in protecting such water supply from pollution."

The matter of giving consent and approval to the proposed taking is one which rests solely in the exercise of sound discretion by your Department. It may give or withhold its consent and approval upon a consideration of any facts which are before it. It may give its approval to the taking of any part of the realty which is proposed to be taken, and may, if it deems proper, withhold such approval from the taking of any part which it deems not necessary for the protection or preservation of the water supply. The Department is not limited to approving or disapproving of the proposed taking as a whole. It lies within the authority of the Department to withhold its approval from the proposed taking if it is satisfied that the same is to be made at a subsequent period and it is not satisfied that a taking, at a later period than the present time, can be determined by it now to be necessary for the protection and preservation of the water supply as indicated in the statute.

I am of the opinion that the Department does not possess authority under the statute "to limit the takings to a specified date or within a specified period of years."

In view of the opinions which I have already expressed, an answer to your third question is not required.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitution — Treasurer and Receiver General — Vacancy in Office.

When a Treasurer and Receiver General who has been elected Lieutenant-Governor takes the oath qualifying him for the latter office, he automatically vacates the former office.

DEC. 5, 1928.

Hon. WILLIAM S. YOUNGMAN, *Treasurer and Receiver General.*

DEAR SIR: — You ask my opinion as to whether you cease to be Treasurer and Receiver General on taking the oath of office as Lieutenant-Governor on Wednesday, January 2, 1929.

So much of Mass. Const. Amend. LXIV, § 1, as is material is as follows:—

"The governor, lieutenant-governor, councillors, secretary, treasurer and receiver-general, attorney-general, auditor, senators and representatives, shall be elected biennially. The governor, lieutenant-governor and councillors shall hold their respective offices from the first Wednesday in January succeeding their election to and including the first Wednesday in January in the third year following their election and until their successors are chosen and qualified. . . . The terms of the secretary, treasurer and receiver-general, attorney-general and auditor, shall begin with the third Wednesday in January succeeding their election, and shall extend to the third Wednesday in January in the third year following their election and until their successors are chosen and qualified."

Mass. Const., pt. 2nd, c. VI, art. II, in so far as material to the question asked by you, is as follows: —

"No governor, lieutenant-governor, or judge of the supreme judicial court, shall hold any other office or place, under the authority of this commonwealth, except such as by this constitution they are admitted to hold, . . ."

The third Wednesday in January, 1929, which marks the end of your term of office as Treasurer and Receiver General, falls on January 16th. The first Wednesday in January, 1929, which will mark the first day of your term of office as Lieutenant-Governor, falls on January 2nd.

I find nothing in the Constitution of Massachusetts, or in the amendments thereto, which permits the Lieutenant-Governor to hold the office of Treasurer and Receiver General, and I am therefore of the opinion that under Mass. Const., pt. 2nd, c. VI, art. II, you will, on taking the oath of office as Lieutenant-Governor on January 2, 1929, automatically cease to be Treasurer and Receiver General.

I am confirmed in this opinion by the reasoning adopted by one of my predecessors in an opinion rendered on February 19, 1917, to the Joint Committee on Constitutional Amendments (V Op. Atty. Gen. 20, 22–23), to the effect that the Governor, Lieutenant-Governor and justices of the Supreme Judicial Court could not, while occupying their respective offices, also sit as delegates in the Constitutional Convention, because the position of delegate to said convention was a place under the authority of the Commonwealth.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Metropolitan District Water Supply Commission — Taxes — Payments.

Under St. 1926, c. 375, the Commonwealth should pay to a town wherein lands have been purchased for the purpose of protecting the purity of the Ware River an amount equal to that which the town would receive for taxes upon the average of the assessed value of the lands, exclusive of structures, for the three years last preceding the purchase, reduced by prior abatements.

DEC. 6, 1928.

Metropolitan District Water Supply Commission.

GENTLEMEN: — You have informed me that the Metropolitan District Water Supply Commission has acquired by purchase certain lands, together with the structures thereon, in the town of Rutland for the purpose of protecting the purity of the waters of the Ware River, to be diverted for a water supply under the provisions of St. 1926, c. 375. You have asked my opinion as to whether, under the provisions of G. L., c. 59, § 6, the Metropolitan District Water Supply Commission should pay to the town of Rutland an amount equal to that which the town would receive upon the average of the assessed values of such land, including buildings or other structures thereon.

G. L., c. 59, § 6, provides as follows: —

"Property held by a city, town or district, including the metropolitan water district, in another city or town for the purpose of a water supply, the protection of its sources, or of sewage disposal, if yielding no rent, shall not be liable to taxation therein; but the city, town or district so holding it shall, annually in September, pay to the city or town where it lies an amount equal to that which such city or town would receive for taxes upon the average of the assessed values of the land, which shall not include buildings or other structures except in the case of land taken for the purpose of protecting the sources of an existing water supply, for the three years last preceding the acquisition thereof, the valuation for each year being reduced by all abatements thereon. Any part of such

land or buildings from which any revenue in the nature of rent is received shall be subject to taxation.

If such land is part of a larger tract which has been assessed as a whole, its assessed valuation in any year shall be taken to be that proportional part of the valuation of the whole tract which the value of the land so acquired, exclusive of buildings, bore in that year to the value of the entire estate."

The above section expressly applies to property held by the Metropolitan Water District. G. L., c. 4, § 7, par. 36, provides that "water district" shall include "water supply district." It follows that section 6 applies to property held by the Metropolitan Water Supply District.

It is provided that property held by a district in another city or town for the purpose of a water supply or for the protection of its sources shall not be liable to taxation if it yields no rent. I am informed that the property in question yields no rent. The property is held for the purpose of a water supply and to protect the sources thereof, it having been acquired in connection with the Ware River project for the purpose of furnishing an adequate water supply for the metropolitan district. It follows, therefore, that the property is not liable to taxation in the city or town where it lies.

Said section 6 further provides that if no taxes are payable on the property the district shall pay to the city or town where it lies a certain amount defined by said section, based upon the average of the assessed values of the land, which shall not include buildings or structures except in the case of land taken for the purpose of protecting the sources of an existing water supply. As to the land itself, clearly this method of payment applies in the present case. Buildings and other structures are not to be included in the assessed value of the land, unless the land is taken for the purpose of protecting an existing water supply. There is at present no existing water supply at this place, and it follows, therefore, that buildings and structures in this area are not to be included in the assessed value which forms the basis for the payment to the city or town in lieu of taxes.

The result is that the Commission should pay to the town of Rutland an amount equal to that which the town would receive for taxes upon the average of the assessed values of the land, not including buildings or other structures thereon, for the three years last preceding the acquisition thereof, the valuation for each year being reduced by all abatements thereon.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Registration — Certified Public Accountant — Change of Business Name.

The addition of the words "& Co." to that of a duly certified public accountant, where the accountant has not in fact created a partnership or a corporation, does not violate the provisions of G. L., c. 112, § 87E, relative to registration.

DEC. 6, 1928.

Mr. W. F. CRAIG, *Director of Registration.*

DEAR SIR: — You have asked my opinion as to whether an individual named John Jones, duly certified as a certified public accountant under

the laws of Massachusetts, may do business under the name of "John Jones & Co., Certified Public Accountants."

G. L., c. 112, § 87E, provides as follows: —

"No person, not registered under the provisions of section eighty-seven C or corresponding provisions of earlier laws, shall designate himself or hold himself out as a certified public accountant. No partnership unless all of its members are registered under said provisions, and no corporation, shall use the words 'certified public accountant' in describing the partnership or corporation or the business thereof; . . ."

As long as there is no corporation or partnership, there can be no objection to John Jones doing business under the above name. The use of the words "& Co." does not constitute John Jones, who is the sole owner, a partnership. These words do not necessarily imply that a partnership exists, as it is perfectly proper for an individual to use the words "& Co." after his name. See *Crompton* v. *Williams*, 216 Mass. 184. There is no violation of the provisions of section 87E disclosed, although it may well be that the individual should file with the city or town clerk the business certificate required by G. L., c. 110, § 5.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Division of Metropolitan Planning — Jurisdiction.

The jurisdiction of the Division of Metropolitan Planning under St. 1923, c. 399, as amended, extends to any town added by the Legislature to the north or south metropolitan district.

DEC. 7, 1928.

Hon. HENRY I. HARRIMAN, *Chairman, Division of Metropolitan Planning.*

DEAR SIR: — You have asked my opinion as to whether St. 1928, c. 384, adds the towns of Norwood, Stoughton and Walpole to the district to be covered by your Division with respect to the investigations and recommendations provided for in St. 1923, c. 399, as amended by St. 1924, c. 354.

At the time of the passage of St. 1923, c. 399, it was, obviously, the intent of the Legislature to make the jurisdiction of the Division of Metropolitan Planning, with respect to transportation service and facilities, co-extensive with the jurisdiction exercised by the Metropolitan District Commission over the north and south metropolitan sewer districts and the metropolitan parks district.

I am of the opinion that the jurisdiction of your Division extends automatically to any town which is added by the Legislature to either the north or south metropolitan sewer district, and that, consequently, the towns of Norwood, Stoughton and Walpole are now a part of the district to be covered by your investigations and recommendations under the statutes above mentioned.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Department of Conservation — Governor — Killing Deer.

Neither the Governor nor the Commissioner of Conservation has the power to restrict or prohibit the killing of deer during the open season; except that the Governor may so act when it shall appear to him that by reason of extreme drouth there is danger of forest fires.

DEC. 10, 1928.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion as to whether or not the Governor of the Commonwealth, the Commissioner of Conservation or any other official has the right to restrict or prohibit the shooting of deer within the open season prescribed by G. L., c. 131, § 63, as amended by St. 1928, c. 215, other than on reservations held by and under the control of the Commonwealth.

Said section 63 provides as follows: —

"Any person duly authorized to hunt in the commonwealth may, between sunrise of the first Monday of December and sunset of the second following Saturday, hunt, pursue, take or kill by the use of a shotgun, a wild deer, subject to the following restrictions and provisions: No person shall, except as provided in the preceding section, kill or have in possession more than one deer. No deer shall be hunted, taken or killed on land posted in accordance with section seventy-nine, or on land under control of the metropolitan district commission, or in violation of any city ordinance or town by-law, or in any state reservation subject to section sixty-eight except as provided therein. No person shall make, set or use any trap, salt lick or other device for the purpose of ensnaring, enticing, taking, injuring or killing a deer. Whoever wounds or kills a deer shall make a written report, signed by him, and send it within twenty-four hours of such wounding or killing, to the director, stating the facts relative to the wounding or killing. Violations of this section shall be punished by a fine of not more than one hundred dollars."

Assuming that a person qualifies, he is entitled to a sporting license which permits him to take and kill deer within the open season as described in said section 63. Section 63 provides that no deer shall be hunted, taken or killed on land posted in accordance with section 79, or on land under control of the Metropolitan District Commission, or in violation of any city ordinance or town by-law, or in any State reservation subject to section 68, except as provided therein. Every person properly holding a sporting license has the right, under the section, to hunt and kill deer on all other lands, provided it is not in violation of any city ordinance or town by-law. The Commissioner has no power to modify or to limit the right to hunt on such other lands.

G. L., c. 131, § 29, as amended by St. 1925, c. 249, provides that the Governor, with the advice and consent of the Council, may suspend the continuance of any or all open seasons established by this chapter whenever it shall appear to him that by reason of extreme drouth there is danger of forest fires resulting from hunting, trapping, fishing or other cause. It will be seen that the power of the Governor under this section is limited to cases in which it appears to him that such danger exists, and it is, of course, for him to decide whether in any given instance there is such danger.

A city or town may by ordinance or by-law prohibit the taking and killing of deer during this season, but if this is not done a person holding a license as above stated may exercise the rights conferred by section 63. If it is deemed advisable to confer upon the Governor or the Commissioner the power to suspend the open season on deer, such power should be given by the Legislature.

I therefore advise you that the Commissioner has no power to prohibit

the taking and killing of deer during the open season established by the Legislature. I further advise you that the Governor has no power to suspend the continuance of said open season except as indicated above. The open season may be suspended by no other body except a city council or board of selectmen in any given city or town.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitution — Treasurer and Receiver General — Vacancy in Office.

When a Treasurer and Receiver General who has been elected Lieutenant-Governor takes the oath qualifying him for the latter office, he automatically vacates the former office.

Two suitable persons are to be appointed in such a contingency to take custody of valuables in the treasury.

DEC. 11, 1928.

His Excellency ALVAN T. FULLER, *Governor of the Commonwealth.*

SIR: — You desire the opinion of this Department with respect to certain questions which may arise incident to the ending of Mr. Youngman's term as Treasurer and Receiver General on the beginning of his term as Lieutenant-Governor.

Under Mass. Const. Amend. LXIV it is provided that "the governor, lieutenant-governor and councillors shall hold their respective offices from the first Wednesday in January succeeding their election to and including the first Wednesday in January in the third year following their election and until their successors are chosen and qualified."

I am advised by the Secretary of the Commonwealth that the practice is for the new Governor and Lieutenant-Governor to take their respective oaths of office on the Thursday next following the first Wednesday in January, which this year will be January 3rd. Under the same amendment the term of the Treasurer and Receiver General and the term of certain other State officers "shall begin with the third Wednesday in January succeeding their election and shall extend to the third Wednesday in January in the third year following their election and until their successors are chosen and qualified." Mr. Youngman's term as Treasurer and Receiver General would normally end, therefore, on the third Wednesday of January, 1929, which will be January 16th; but Mr. Youngman has been elected to the office of Lieutenant-Governor, and in the normal course of events would take the oath of office as Lieutenant-Governor on Thursday, January 3rd, thus creating a vacancy in the office of Treasurer and Receiver General.

Mass. Const. Amend. XVII provides, in part, that, "in case the office . . . of treasurer and receiver-general . . . shall become vacant, from any cause, during an annual or special session of the general court, such vacancy shall in like manner be filled by choice from the people at large." The words "in like manner" refer to an election by joint ballot of the senators and representatives in one room.

Mass. Const. Amend. LXIV further provides that "the terms of senators and representatives shall begin with the first Wednesday in January succeeding their election and shall extend to the first Wednesday in January in the third year following their election and until their successors are chosen and qualified." The incoming Legislature, therefore, comes in on Wednesday, January 2nd, and on that day the Senate and

House organize, and the annual session referred to in Mass. Const. Amend. XVII thereupon begins on that day. Therefore, at the time Mr. Youngman, on Thursday, January 3rd, takes the oath of office as Lieutenant-Governor, and thereafter automatically ceases to be Treasurer and Receiver General, the filling of that vacancy in the office of Treasurer and Receiver General is one that must, under Amendment XVII, above quoted, be filled by an election by the two houses of the Legislature on a joint ballot.

G. L., c. 10, § 12, provides as follows: —

"Upon a vacancy in the office of state treasurer, the state secretary, with two suitable persons appointed by warrant of the governor, shall, after notice to the former treasurer, . . . and to his sureties or one of them, or to such of them as are within the commonwealth, seal up and secure, in their presence if they attend, all money, papers and other things supposed to be the property of the commonwealth . . ."

And the same chapter contains further provisions as to what the Secretary of the Commonwealth and the two suitable persons shall thereafter do by way of making an inventory of money and securities and other things and for the exchanging of receipts with the new Treasurer and Receiver General.

My conclusions are that Mr. Youngman, by taking the oath of office as Lieutenant-Governor on January 3rd, will thereby automatically vacate the office of Treasurer and Receiver General; that the Legislature will then be in session, and, under the Constitution, will have the power of filling the office of Treasurer and Receiver General by an election, and that, pending such election, it will be the duty of the Secretary of the Commonwealth and two suitable persons to be appointed by Your Excellency to take custody, after certain formalities, of all the money, papers and other things supposed to be the property of the Commonwealth in the office of the Treasurer and Receiver General, and to retain them until a new Treasurer and Receiver General shall have been qualified. Your Excellency should be prepared, therefore, to appoint under your warrant two suitable persons to act seasonably with the Secretary of the Commonwealth.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Stock Company — Dividends.

Policyholders may participate in dividends of stock companies of insurance other than life insurance.

JAN. 2, 1929.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — My opinion is requested upon the following question: —

"Is it lawful for a stock insurance company, other than a life company, to pay or allow dividends to policyholders under policies issued in this commonwealth, or is the payment or allowance thereof prohibited by G. L., c. 175, §§ 182 and 184?"

I assume from the facts stated in your letter that the privilege or right to participate in dividends declared by the stock insurance company to whom you refer is set forth in the policy itself.

That general participation by policyholders in dividends of stock companies is not a violation of the prohibitions against rebates and considerations, contained in sections of the statutes regulating insurance (now embodied in G. L., c. 175, §§ 182–184, as amended), was held in an opinion of one of my predecessors in office (IV Op. Atty. Gen. 503), with which I concur. The amendments made in the various statutes regulating the insurance business since such opinion was written do not evidence any legislative intent to make such participation unlawful. The particular reference to participation in the savings, earnings or surplus of mutual insurance companies without specification in the policy, inserted in the statutes since the writing of said opinion (G. L., c. 175, § 184, as amended), does not, in my opinion, affect the legality of participation in the dividends of a stock company specified in the policy when such participation is not in its nature a "special advantage" with regard to any particular policyholder or holders, as the words "special advantage" are construed in said opinion of one of my predecessors in office.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Police Commissioner for the City of Boston — Traffic Signs — Expense.

Expenses of erection and maintenance of traffic signs in Boston fall upon the police department.

JAN. 3, 1929.

Hon. HERBERT A. WILSON, *Police Commissioner for the City of Boston.*

DEAR SIR: — You have asked me to advise you upon the following: —

"The exact question in issue is whether in Boston the Police Commissioner or the Board of Street Commissioners or the Department of Public Works of the Commonwealth has the authority and duty to place signs, markings, etc., after they have been authorized by ordinance or by-law and approved by the Department of Public Works."

Traffic signs and markings made necessary by ordinance regulation or by law of the city of Boston or its officials, and approved by the Department of Public Works of the Commonwealth, are not required by law to be placed or paid for by said Department. St. 1928, c. 357, authorizes the said Department to erect and maintain such signs and markings on certain highways, and if these be in fact erected and maintained by said Department the expense thereof should be borne by it, but the expense of such signs and markings upon such highways, or upon other highways, erected or maintained thereon by any city or town with the approval of the said Department, is not required to be borne by the said Department.

As to the allocation of the expense of the erection and maintenance of signs and traffic markings to be erected by the city of Boston, with the approval of the said Department, as between the Police Commissioner and the Street Commissioners of Boston, I am of the opinion that such expense should be paid as expenses of the police department, and that the Police Commissioner has the authority and duty of placing such signs and markings as are necessary to enforce the regulations, ordinances and by-laws which have been made and approved with relation to street traffic. St. 1908, c. 447.

I am not unaware of the limitations to the extent to which opinions and advice should be given to the Police Commissioner for the city of

Boston by the Attorney General (see VII Op. Atty. Gen. 735), but I consider that your question so far involves a consideration of the duties of the Commissioner under the statutes governing his office as to require an expression of my opinion thereon.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Department of Labor and Industries — Common Drinking Cups and Towels — Rules.

The Department of Labor and Industries may make rules and regulations relative to common drinking cups and towels in certain places, under G. L., c. 149, § 113, but not under § 6.

JAN. 5, 1929.

Gen. E. LEROY SWEETSER, *Commissioner of Labor and Industries.*

DEAR SIR: — You have asked my opinion as to whether the Department of Labor and Industries has the legal power, under G. L., c. 149, § 6, to make rules and regulations prohibiting the use of a common drinking cup and a common towel in factories, workshops and mercantile establishments. Said section 6 provides as follows: —

"It shall investigate from time to time employments and places of employment, and determine what suitable safety devices or other reasonable means or requirements for the prevention of accidents shall be adopted or followed in any or all such employments or places of employment; and also shall determine what suitable devices or other reasonable means or requirements for the prevention of industrial or occupational diseases shall be adopted or followed in any or all such employments or places of employment; and shall make reasonable rules, regulations and orders applicable to either employers or employees or both for the prevention of accidents and the prevention of industrial or occupational diseases."

Section 1 of said chapter 149 contains the following definition: —

"'Industrial disease' or 'occupational disease', any ailment or disease caused by the nature or circumstances of the employment."

Industrial or occupational diseases, as defined above, are those arising from the peculiar nature of the employment, and do not include diseases that are communicable to other persons by reason of the use of a common drinking cup or common towel. Diseases communicated to others by the use of such cup or towel are not incidental or peculiar to the employment but are of a nature that may be communicated by such use without reference to the nature or circumstances of the employment. It follows that, under section 6, the Department has no power to make the rules and regulations under consideration.

However, I am of the opinion that the Department, under the authority of G. L., c. 149, § 113, may make reasonable rules and regulations prohibiting the use of the common drinking cup or common towel in any factory, workshop, manufacturing, mechanical or mercantile establishment. Said section 113 provides as follows: —

"Every factory, workshop, manufacturing, mechanical and mercantile establishment shall be well lighted, well ventilated and kept clean and

free from unsanitary conditions, according to reasonable rules and regulations adopted by the department with reference thereto."

In order to keep such places clean and free from unsanitary conditions, it is clearly reasonable to prohibit the common drinking cup and common towel, both of which are universally recognized to be unsanitary and dangerous to public health. The Department will be acting well within the scope of this section if it makes the rules and regulations under consideration.

Section 106 of said chapter 149 provides as follows: —

"All industrial establishments shall provide fresh and pure drinking water to which their employees shall have access during working hours. Any person owning, in whole or in part, managing, controlling or superintending any industrial establishment in which this section is violated shall, on the complaint of the local board of health, the selectmen of a town or an inspector, be punished by a fine of one hundred dollars."

This section, contained in the chapter dealing with Labor and Industries, indicates that the question of supplying fresh and pure drinking water to employees in any industrial establishment is clearly one for the attention of the Department of Labor and Industries, and adds weight to the conclusion that the Department may make the rules and regulations above referred to.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Department of Public Safety — Forfeited Automobiles — Sales.

The Department of Public Safety may sell automobiles forfeited and forwarded to it under an order of court.

JAN. 9, 1929.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You have asked me to advise you on the following matter: —

"Inquiry has been made regarding the status of cases concerning two automobiles forfeited to the Commonwealth but with suits brought against the State to recover. One concerns a Ford coupé forfeited July 6, 1927; the other concerns a Ford coupé forfeited on October 28, 1927.

We have these cars in our possession and desire to dispose of them, our facilities for storage being very limited and the cars not improved by not being used."

I am unable to find any provision of law permitting actions against the Commonwealth to recover, after forfeiture by "authority of the court or trial justice," implements of sale or furniture used or kept and provided to be used in the illegal keeping or sale of intoxicating liquor.

"Under our system of jurisprudence the Commonwealth cannot be impleaded in its own courts except with its consent." *Glickman* v. *Commonwealth*, 244 Mass. 148.

Suits brought to recover automobiles forfeited would be futile gestures on the part of the petitioners.

In the case of *E. J. Fitzwilliam Co., Inc.* v. *Commonwealth*, 258 Mass. 103, 107, the court said: —

"Proceedings for the forfeiture of an automobile, because of its connection with the illegal sale or keeping for sale of intoxicating liquor under statutes already cited, are proceedings *in rem*. The principle of the statute is that the container of the intoxicating liquor or the implements of sale used or kept to be used in connection with the illegal sale or keeping for sale of such liquor, themselves constitute a subject liable to offend against the public welfare notwithstanding the innocence of the owner. The things themselves are primarily treated as the offender. The intent of the person in actual control may in some circumstances be enough to determine the guilt of the articles against which the complaint for forfeiture is pending."

G. L., c. 138, § 71, provides that implements of sale and furniture seized and forfeited shall be disposed of in the manner prescribed in G. L., c. 138, § 69, for the disposition of intoxicating liquor. Said section 69, as amended by St. 1923, c. 329, provides, in part, that if, "in the judgment of the commissioner it is for the best interests of the commonwealth to sell the same, he shall cause the same to be sold."

I am of the opinion that you may sell automobiles forfeited and forwarded to the Department of Public Safety by an order of court, if you deem a sale to be for the best interests of the Commonwealth.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Board of Retirement — State Employees — Age.

A member of the State Retirement Association, sixty years of age, who has been in the service of the Commonwealth over fifteen years immediately preceding request for retirement, and whose retirement is requested by the head of his department, has an absolute right to retire, and must retire at seventy. Between those ages the Board of Retirement has the right to exercise its discretion relative to such retirement.

JAN. 9, 1929.

State Board of Retirement.

GENTLEMEN: — I have been requested by the former Treasurer and Receiver General, while Chairman of the State Board of Retirement, to advise you in relation to your powers and duties under G. L., c. 32, § 2 (4), as amended, upon the following matter in connection with an employee of a State department: —

"The Board of Retirement wishes your opinion as to whether it is the meaning and intent of the law that this Board is obliged to retire a State employee when demand is made by the head of the department for his retirement, as it is in this case, and when it is insisted upon by the head of the department despite the objection of the employee, as it is in this case."

That portion of the said section applicable to your inquiry reads as follows: —

"Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire or be retired by the board upon recommendation of the head of the department in which he is employed, or, in case

of members appointed by the governor, upon recommendation of the governor and council, and any member who reaches the age of seventy must so retire."

The jurisdiction of your Board under said subsection to deal with the retirement of a member employed in a department exists (1) when the member has reached the age of sixty and has been in the continuous service of the Commonwealth for a period of fifteen years immediately preceding an application for retirement, and (2) when a recommendation for the member's retirement is presented to you by one who is in fact the head of a department in which such member is employed. See IV Op. Atty. Gen. 105. Such a member, after attaining the age of sixty, has an absolute right to retire, if he desires to do so, without the necessity for any action on the part of your Board, and must retire at seventy.

Between the ages of sixty and seventy such a member may be retired by your Board when it has jurisdiction over the matter by reason of the existence of the facts already referred to, irrespective of the desire of the member. A decision relative thereto rests with your Board, and I am of the opinion that your Board is not obliged to retire such a member merely because a recommendation for retirement is transmitted to it by the proper official, but that the instant statute gives to the Board authority to act in its sound discretion upon such recommendation.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Small Loans Law — Installment Notes.

Plans for the payment of insurance upon notes payable by the purchasers do not relate to loans under G. L., c. 140, §§ 96–114.

JAN. 17, 1929.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR: — You have requested my opinion in the following communication: —

"The opinion of your Department is respectfully requested as to whether two plans for financing automobile and fire insurance premiums, where the amounts are $300 or under, come under the scope of G. L., c. 140, §§ 96–114, inclusive.

The plan marked 'A' has to do with the financing of automobile liability insurance premiums, and the plan marked 'B' has to do with fire insurance premiums."

The plans referred to in your letter as "A" and "B" appear to be, respectively, (*a*) a promissory note, payable in the installments indicated on its face, to secure payment of premium upon a policy or policies of automobile insurance issued through the office of the payee by insurance companies for which the payee is an agent, with authority to the payee to cancel the policy or policies in the name of the maker if default is made in any of the specified payments in the note; and (*b*) a similar note to secure payment of premium upon a policy or policies of fire insurance.

I am of the opinion that the plans to which you refer, as evidenced by the face of the notes which you have submitted, do not relate to "loans," within the meaning of G. L., c. 140, §§ 96–114, but are in the nature of

agreements for the extension of credit for policies of insurance actually purchased by the maker of the notes, and as such are not within the purview of said G. L., c. 140, §§ 96–114.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Acceptance of Statute by a Town — Vote of Inhabitants.

Acceptance of an act by vote of the inhabitants of a town is made by a vote at a town meeting.

JAN. 19, 1929.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion in the following communication: —

"St. 1928, c. 406, entitled 'An Act to permit certain sports and games on the Lord's Day,' by section 2 amends G. L., c. 136, § 21, and provides as follows: —

'In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council and in any town which accepts said sections by vote of its inhabitants, it shall be lawful to take part in or witness any athletic outdoor sport or game on the Lord's day between the hours of two and six in the afternoon as hereinafter provided.'

Your opinion is respectfully requested as to whether the phrase 'by vote of its inhabitants' means the vote of a town on an official ballot or in open town meeting.

In a town which has a representative form of town government does it mean that the representatives will represent the inhabitants so far as to permit them to vote on the question, or should the question appear on the official ballot to be voted on by the inhabitants?"

G. L., c. 4, § 4, reads as follows: —

"Wherever it is provided that a statute shall take effect upon its acceptance by a city or town, such acceptance shall, except as otherwise provided in such statute, be, in a city, by vote of the city council or, in a town, by vote of the inhabitants thereof at a town meeting."

The phrase used in St. 1928, c. 406, as to its acceptance in any town "by vote of its inhabitants" does not indicate an intention that the vote shall be taken in a manner other than that set forth in G. L., c. 4, § 4, which provides for a "vote of the inhabitants . . . at a town meeting."

G. L., c. 54, § 104, is not applicable to a vote upon the acceptance of statutory provisions, for reasons set forth in *Moloney* v. *Selectmen of Milford*, 253 Mass. 400, 403–404.

The adoption of a representative form of town government does not, in my opinion, so alter the relations of the inhabitants of a town to its town meeting as to make necessary a construction of the words "by vote of its inhabitants," as used in the instant statute, as expressing a legislative intent that the requisite vote should be by official ballot at the polls and not by the town meeting.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Trust Company — Trust Funds — Commercial Funds — Mingling.

An investment of a group of trust funds by the trust department of a trust company in a mortgage loan or group of loans, in which the funds of the commercial department of the trust company are also invested, is improper.

JAN. 21, 1929.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR: — You have requested my opinion as to the propriety of the investment of certain trust funds by trust companies authorized to act in a fiduciary capacity. You state the following facts: —

A trust company suggests that it proposes to have all real estate mortgages owned by the company transferred to the trust department to form a pool of mortgages. Thereupon participation certificates in such pool or fund would be issued to the various trust estates in which the trust company, by its trust department, was acting in a fiduciary capacity. Any excess interests in the pool not absorbed by the trust department for its trust estates would be held by the commercial department of the bank. The result of such an arrangement would be a constant participation by the commercial department of the trust company in the fund or pool through the ownership by the commercial department of trust participation certificates.

You state that under the proposed scheme this form of investment would be used not only for small amounts of trust estates which could not otherwise be advantageously invested, but would also be made the primary form of investment for the funds of all trust estates held by the bank. The propriety of such investment of trust funds by trust companies and national banks doing business as fiduciaries within Massachusetts must be considered in two aspects: —

1. How far does the statute law applicable to trust companies and to national banks acting as fiduciaries, respectively, permit or prohibit such investment?

2. How far may any fiduciary acting under appointment by a court of equity or subject to the control of a court of equity make such an investment properly under the principles of equity applicable to the administration of trust estates?

A. *Statute Law Relating to Trust Companies.*

G. L., c. 172, §§ 49, 52–54 and 59, read as follows: —

"SECTION 49. Every such corporation acting under any provision of the following section or section fifty-two shall have a trust department in which all business authorized by said sections shall be kept separate and distinct from its general business.

. . . . . .

SECTION 52. Such corporation may be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator or trustee under a will or instrument creating a trust for the care and management of property, under the same circumstances, in the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual. Any such appoint-

ment as guardian shall apply to the estate and not to the person of the ward. Such corporation shall not be required to receive or hold property or money or assume or execute a trust under this section or of section fifty without its assent.

SECTION 53. Every such corporation may invest the funds or assets which it may receive and hold under the preceding section in the same way, to the same extent, and under the same restrictions as an individual holding a similar position may invest such funds or assets.

SECTION 54. Money, property or securities received, invested or loaned under the provisions of sections fifty to fifty-two, inclusive, shall be a special deposit in such corporation, and the accounts thereof, shall be kept separate. Such funds and the investment or loans thereof shall be specially appropriated to the security and payment of such deposits, shall not be mingled with the investments of the capital stock or other money or property belonging to such corporation, or be liable for the debts or obligations thereof.

. . . . . .

SECTION 59. A person creating a trust may direct whether money or property deposited under it shall be held and invested separately or invested in the general trust fund of the corporation; and such corporation acting as trustee shall be governed by directions contained in the will or instrument under which it acts."

In my opinion, sections 53 and 54, above quoted, effectually prohibit such an investment as that suggested in your request for an opinion, and I respectfully advise you that such an investment of trust funds by the trust department of a Massachusetts trust company in a mortgage loan or group of such loans, in which the funds of the commercial department of the bank are also invested, would be manifestly improper. The situation which you suggest, when analyzed, amounts to little more than this: A trust company desires to pool the real estate mortgage loans made by it and to issue against such loans participation certificates to the trust accounts held by it, in the proportion in which funds of such trusts are used in making such loans. At the same time the commercial department will receive participation certificates in the pool mortgage loans in proportion to its interest in those loans. The participation certificate device is really, in substance, not different from a bookkeeping arrangement by which the bank indicates upon its own records the proportion in which its trust accounts and its commercial department have made a loan to strangers in the name of the bank upon the security of real estate mortgages. In my opinion, such an investment of trust funds was intended to be prohibited by the sections to which I have referred, and this conclusion is to some extent reenforced by the language of the Supreme Judicial Court in the cases in which it has construed the sections quoted. *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440, 447–448, approved *Atlantic National Bank, petitioner*, 261 Mass. 217, 219; *Worcester County National Bank, petitioner*, 263 Mass. 444; *cf. Campbell* v. *Commissioner of Banks*, 241 Mass. 262, 265.

B. *The Situation with Respect to National Banks acting as Fiduciaries in Massachusetts in accordance with a License granted by the Federal Reserve Board under the Provisions of Code of Laws of the U. S., Title 12, § 248 (k).*

(Act of Dec. 23, 1923, chap. 6, § 11, 38 Stat. et al. 264, as amended by Act of Sept. 26, 1918, chap. 177, § 2, 40 Stat. et al. 968.)

In view of the length of the statute above referred to it is not here quoted, but therein it is provided, in part, as follows: —

"National banks exercising any or all of the powers enumerated in this subsection (*k*) shall segregate all assets held in any fiduciary capacity from the general assets of the bank . . .

Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board."

The section generally gives to national banks holding the permit authorized by the section the power to act as trustee, or in other fiduciary capacities, in competition with state banks and trust companies, where such power is granted to state banks. There is no indication in the section that a national bank performing the duties of a fiduciary, under appointment of a state court or subject to the provisions of state law as to the administration of trusts, is not in every respect as fully subject to the control of the court or to the provisions of the state law in the administration of such trusts as a trust company or an individual acting in a similar fiduciary capacity. This question was expressly left undecided by the Supreme Judicial Court in the case of *Commonwealth-Atlantic National Bank, petitioner*, 249 Mass. 440, 447. The reasoning of *Worcester County National Bank, petitioner*, 263 Mass. 444, and the cases therein cited, however, is clearly to the effect that a national bank acting as a fiduciary appointed by a state court is, with respect to the administration of the estate and trust committed to it, subject to the control of the court in the same way that an individual or state trust company would be if carrying out the same trust. It therefore becomes pertinent to discover whether the general principles of equity governing the administration of trust estates would permit such an investment by a trustee administering a trust or other fiduciary obligation subject to the control of a court of this Commonwealth.

C. *The General Principles of Equity Applicable to Such Investments.*

It is well settled that it is the duty of trustees holding distinct trust funds to segregate them. They cannot ordinarily be invested together and the net income prorated to the beneficiaries. *Lannin* v. *Buckley*, 256 Mass. 78, 82. The situation now under consideration even more strongly calls for the application of the rule requiring the complete separation of trust funds from funds owned by the trustee individually, because of the fundamental principle that a trustee, apart from his proper compensation as such trustee, should not in any respect have any pecuniary interest in the administration of his trust. See, for example, *Bullivant* v. *First National Bank of Boston*, 246 Mass. 324, 334. *Witherington* v. *Nickerson*, 256 Mass. 351, 357.

The arrangement concerning which you have requested this opinion clearly involves the mingling of trust assets and commercial assets of the trust company in such a way as to create a very decided intermingling of personal interest with that of the bank as fiduciary. In the absence of clear authorization in the trust instrument under which the fiduciary is acting, such a mingling of interest would not, in my opinion, be proper for a trustee, whether an individual or a corporation acting by appointment from a Massachusetts court or subject to the general control of a Massachusetts court of equity.

Nothing in this opinion should be construed as advising that it is improper for a trust department of a trust company to permit two or more of the trust estates held by it to participate in the whole of a single loan secured by mortgage, by use of the participation certificate device. That question has not been considered and no opinion is hereby expressed thereon.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Banking — Deposits in Two Names — Joint Accounts.

A joint account in which the word "and" joins the names of the depositors falls within the provisions of G. L., c. 167, § 14.

An account in a savings bank doing life insurance business, payable to the insured and after his death to a beneficiary, is not a joint account.

JAN. 22, 1929.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR: — You have requested my advice upon certain questions relative to deposits made in the names of two persons.

The applicable statute, G. L., c. 167, § 14, reads as follows: —

"When a deposit is made in any bank, in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or interest or dividend thereon, if not then attached at law or in equity in a suit against either of said persons, may be paid to either of said persons, whether the other be living or not, and such payment shall discharge the bank making such payment from its obligation, if any, to such other person or to his legal representatives for or on account of such deposit."

You state that deposits such as are referred to in the statute are sometimes made in the following form: —

"John Doe *or* Mary Doe
Payable to either or the survivor."

And at other times are written as follows: —

"John Doe *and* Mary Doe
Payable to either or the survivor."

Your first question, which relates to such forms, is: —

"Can the joint account in which the word 'and' joins the names of the depositors be construed as a joint account within the meaning of G. L., c. 167, § 14?"

I answer this question in the affirmative.

Inasmuch as in each instance which you cite the words "payable to either or the survivor" appear, it is immaterial whether the word "or" be used with the two names or the word "and." In each instance the form used sufficiently expresses an intention to make a deposit of the kind which falls within the meaning of the statute, and to which all the terms of the statute are applicable. Were the phrase "payable to either or the survivor" not employed in the second form, the two forms which you have set forth would not have a precisely synonymous meaning.

You have set forth a form said to be used in designating deposits in savings banks which act as agents for savings bank life insurance. This form reads: —

> "John Doe or Mary Doe
> Payable to the insured during his
> or her life.
> Payable to the survivor in the event
> of death."

Your question with relation to this form is: —

"Can this account be construed as a joint account within the meaning of section 14, since it is not payable to either except on the death of one?"

I answer your question in the negative, inasmuch as the deposit is payable to the insured depositor alone during his life.

Your third question with relation to the form of deposit last mentioned is: —

"Can the bank, upon the death of the insured, pay this account to other than his or her estate?"

A deposit made in the said form is not such a deposit as is governed by said G. L., c. 167, § 14, and the provisions thereof have no application to it. The question, as between the bank and its depositors with relation to a construction of the precise character of the ownership of the deposit, created by the said form, would seem to be one primarily for judicial determination. In the absence of such a determination I do not express an opinion upon this question, which is not one which relates directly to the discharge of your functions as Commissioner.

Your fourth question is: —

"Can the bank loan to one of the parties of a so-called joint account (John Doe or Mary Doe, payable to either or the survivor) without the consent of the other?"

G. L., c. 168, as pointed out in your letter, provides in some of its sections that a savings bank may loan money to a depositor upon the pass book as collateral security.

In *Marble* v. *Treasurer and Receiver General*, 245 Mass. 504, the court stated that a deposit such as you describe in your fourth question is not strictly a joint tenancy nor is it an estate by the entirety, where the depositors are husband and wife, because of the express terms of the deposit that either one of the depositors may withdraw any part or the whole of the fund on his single receipt or order, and thereby terminate the tenancy without the consent of the other. This right violates the essential character of a true joint tenancy. The estate created by such a deposit is at most analogous to a joint tenancy but is not a joint tenancy in the accurate meaning of those words.

There exists a contract between the bank and the depositors that the bank will pay the whole or any part of the deposit as agreed upon.

Whether an implied contract by the bank to loan to one of the depositors also exists, under the peculiar circumstances surrounding such a deposit, has not been considered by our Supreme Judicial Court. If there were a true joint tenancy in the deposit, no one of the owners might cumber the same by pledging it. Such a pledging would amount to a severance of the joint tenancy, and it would therefore be improper for a savings bank to make such a loan. Whether or not such a deposit is so analogous to a joint tenancy that a pledge by one of the depositors would be improper as against the other, has not been passed upon by the court. These questions are primarily for judicial determination, and relate particularly to the relations between a savings bank and its depositors, under the terms of a contractual arrangement between them. In the absence of judicial determination of the points which I have noted, I do not express an opinion upon your fourth question, which, like the third, is not one relating directly to the discharge of your functions as Commissioner.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Taxation — Life Insurance Policy — Change of Beneficiary.

The proceeds of a life insurance policy in which the insured reserves the right to change the beneficiary, and which is payable after the death of the insured to a beneficiary named in the policy, are not subject to an inheritance tax.

Nor are the proceeds of such a policy subject to tax if the insured has not reserved the right to change the beneficiary.

JAN. 22, 1929.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have requested my opinion on the following questions: —

"Are the proceeds of a life insurance policy in which the insured has reserved the right to change the beneficiary, which policy is payable after the death of the insured to a beneficiary named in the policy, subject to inheritance tax in Massachusetts under the laws now in effect?

Are the proceeds of a life insurance policy subject to tax if the insured has not reserved the right to change the beneficiary?"

Our Massachusetts succession tax statute does not mention life insurance policies specifically. The only words of the statute which might be said to include life insurance policies taken out by the insured upon his life and payable to other beneficiaries than his own estate are the words in G. L., c. 65, § 1, as amended, — "property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession or enjoyment after his death (the death of the donor)." The Massachusetts Supreme Judicial Court has held that these words of the succession tax statute, properly construed, do not include life insurance policies, and that the proceeds of life insurance policies are not subject to an inheritance tax in Massachusetts. *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306.

It is my opinion that the recent United States Supreme Court decision in *Chase National Bank* v. *United States*, 278 U. S. 327, may be distinguished from the decision in *Tyler* v. *Treasurer and Receiver General*, 226 Mass. 306.

In the Chase National Bank case the United States Supreme Court was considering the Federal estate tax law, which specifically provides that the gross estate of the decedent, for taxation purposes, shall include life insurance policies taken out by the decedent upon his own life and made payable to other beneficiaries than his own estate. The United States Supreme Court was thus considering a tax upon the right to transfer, and held that the reserved power in the insured to change the beneficiary gave the insured a power of control which might properly be made the subject of a transfer tax. By inference it would seem that even in the United States Supreme Court, in a case where the Federal estate tax is involved, the proceeds of a life insurance policy would not be subject to a transfer tax if the insured has not reserved the right to change the beneficiary. The language of the decision strongly suggests that a life insurance policy payable to a beneficiary other than the estate of the insured may properly be considered a gift to take effect in possession or enjoyment after the death of the insured, and to hold that a life insurance policy is a gift from the insured to the beneficiary.

The Tyler case was decided in 1917. It is a case which turns upon the construction of a State statute. The Massachusetts court is not bound by the opinion of the United States Supreme Court as to the construction of a State statute. A State court construction of a State statute is final. In this case the court said that a life insurance policy made payable by the insured to a beneficiary other than his estate "does not by fair intendment come within the descriptive words of the statute as 'property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession or enjoyment after the death of the grantor.'"

It seems clear, therefore, that the cases can be distinguished by reason of the construction of the statutes involved; and until the Massachusetts succession tax statute specifically includes life insurance policies of this nature within its terms, it is my opinion that a succession tax upon such insurance policies will not be sustained by our Massachusetts court.

The answer to the first question must therefore be in the negative, and, *a fortiori*, the answer to the second question must also be in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Stock of Trust Company held by Other Banking Organizations.

A proposed law penalizing a trust company, by liquidation, for the holding of more than a certain per cent of its stock by certain organizations, would, if enacted, be unconstitutional as drawn.

FEB. 13, 1929.

HON. HENRY L. KINCAIDE, *Senate Chairman, Committee on Banks and Banking.*

DEAR SIR: — Your committee has asked my opinion relative to the constitutionality, if enacted into law, of House Bill No. 613, which reads as follows: —

"Chapter one hundred and sixty-seven of the General Laws is hereby amended by inserting after section twenty-two the following new section: —

SECTION 22A. Whenever it shall appear to the commissioner of banks that more than ten per cent of the capital stock of any trust company is held, owned, or controlled, directly or indirectly, by any other trust company or by any banking association organized under the laws of the United States of America, or by any corporation, association, or trust directly or indirectly owned, controlled, or affiliated with such other trust company or banking association, the commissioner of banks shall notify the holder of such capital stock to divest itself thereof within thirty days from the date of such notice, and in the event of failure so to do, the commissioner of banks shall take possession forthwith of the property and business of such trust company more than ten per cent of the capital stock of which is so held, owned, or controlled, and retain possession of such trust company and liquidate its affairs in the manner herein provided."

The proposed act in effect penalizes a trust company, by the drastic measure of enforced liquidation, not for any unlawful or improper action of such company but solely because of the failure of some other body (not under the control of the trust company) to comply with an order of the Commissioner of Banks. Such a provision, on its face, is so arbitrary and unfair as to give rise to grave doubts as to its validity, if enacted, under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Whether the main objects of the proposed act could be accomplished by legislation which would constitute a valid exercise of the police power by the General Court, and more particularly of the reserved right to amend and repeal the charters of domestic corporations, I do not need to advise. The act, as printed above, is so indefinite, uncertain and vague in the standards of conduct which it lays down, either for the guidance of individuals investing in the stock of a trust company or for the direction of the activities of the Commissioner of Banks, that it would certainly be, for that reason alone, in contravention of the due process clause of the Fourteenth Amendment to the Federal Constitution. What constitutes control "directly or indirectly," within the meaning of the act, is in no way definitely set forth. A corporate purchaser of stock of a Massachusetts trust company, if this bill were enacted, would have no basis for determining whether its purchase (if it involved more than ten per cent of the stock of the trust company) would cause the eventual dissolution of the trust company, thereby endangering the purchase as an investment. The only criterion by which the validity of the purchase could be gauged would be a guess as to the way in which the Commissioner of Banks would regard the corporation's relations with all or any of its banking connections. Because of the absence of any standard which an ordinary man could by his general knowledge apply with reasonable certainty to his proposed conduct, the proposed bill is, in my opinion, unconstitutional. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, and cases there cited; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457; *cf. Nash* v. *United States*, 229 U. S. 373, 376. Despite grave doubts upon other grounds as to the validity of the whole method provided by the proposed bill for carrying out its purpose, I limit my opinion to the single ground of unconstitutional indefiniteness.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles — Compulsory Motor Vehicle Insurance — Express Business.

Motor vehicles owned by express companies are excepted from the application of the compulsory insurance act.

Feb. 16, 1929.

Hon. Frank E. Lyman, *Commissioner of Public Works.*

Dear Sir: — You request my opinion as to whether motor vehicles owned by a corporation engaged in the express business, and, so far as the statutes provide, under the supervision of the Department of Public Utilities, are outside of the application of the compulsory insurance act.

That act provides (G. L., c. 90, § 1A): —

"No motor vehicle or trailer, except one owned by a person, firm or corporation for the operation of which security is required to be furnished under section forty-six of chapter one hundred and fifty-nine, or one owned by any other corporation subject to the supervision and control of the department of public utilities or by a street railway company under public control, or by the commonwealth or any political subdivision thereof, shall be registered under sections two to five, inclusive, unless the application therefor is accompanied by a certificate as defined in section thirty-four A."

The question is whether the fact that the jurisdiction of the Department of Public Utilities over express companies appears to be somewhat limited takes the ease out of the words of the statute above quoted.

The provisions conferring jurisdiction upon the Department of Public Utilities are contained in G. L., c. 159, § 12, which reads as follows: —

"The department shall, so far as may be necessary for the purpose of carrying out the provisions of law relative thereto, have general supervision and regulation of, and jurisdiction and control over, the followiug services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies furnishing or rendering any such service or services, in sections ten to forty-four, inclusive, collectively called common carriers and severally called a common carrier:

(*a*) The transportation or carriage of persons or property, or both, between points within the commonwealth by railroads, street railways, in this chapter called railways, electric railroads, trackless trolleys and steamships, including express service and car service carried on upon or rendered in connection with such railroads, railways, electric railroads, trackless trolleys or steamships.

(*b*) The carriage of passengers for hire upon motor vehicles as provided in sections forty-five to forty-nine, inclusive, of this chapter and section forty-four of chapter one hundred and sixty-one, but only to the extent provided in said sections.

(*c*) The operation of all conveniences, appliances, facilities or equipment utilized in connection with, or appertaining to, such transportation or carriage of persons or property or such express service or car service, by whomsoever owned or provided, whether the service be common carriage or merely in facilitation of common carriage.

(*d*) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other

method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith."

G. L., c. 159, § 33, provides: —

"Every person doing an express business upon either a railroad or railway in the commonwealth shall annually transmit to the department a return on oath of his doings setting forth copies of all contracts made during the year with other persons doing a transportation or express business upon any railroad or railway in the commonwealth, and shall give complete information in reply to the questions presented in the form for such return which shall be prescribed by the department. A person neglecting to make such return or, if defective or erroneous, to amend it within fifteen days after a request so to do shall forfeit twenty-five dollars for each day during which such neglect continues."

Even if it were assumed that the Department, under chapter 159, has no supervision and control over express service except so far as it is rendered upon railroads or steamships, it would be difficult to say that the words of section 1A of chapter 90 are inapplicable, for those words apply to the corporation and not to the service. But, in fact, it seems that the supervision and control of the Department over express companies is not so confined [see G. L., c. 159, §§ 12 (*c*) and 33], and, in practice, the Department requires companies rendering returns under section 33 to give such information as cost and repairs of motor trucks.

In my opinion, the motor vehicles in question are excepted from the application of the insurance act by the express terms of section 1A.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Savings Bank Life Insurance — Statutory Limitations.

The Legislature may, without violating constitutional provisions, limit the amount of the hazard which savings banks as an entire group may venture upon lives of insureds.

FEB. 21, 1929.

Hon. C. WESLEY HALE, *Senate Chairman, Committee on Insurance.*

DEAR SIR: — The Committee on Insurance, through you, has asked my opinion upon the following matter relating to savings bank life insurance: —

"Would the limitations, as proposed in document known as Senate 132, if enacted into law, violate any constitutional right of the citizens of this Commonwealth, and how, if at all, would your opinion differ if the life insurance limitation were changed from five thousand dollars to ten thousand dollars, the amount available at the present time?"

The proposed bill, Senate No. 132, is entitled "An Act relative to the amount of insurance which savings and insurance banks may pay upon the death of the insured," and reads as follows: —

"SECTION 1. Section ten of chapter one hundred and seventy-eight of the General Laws is hereby amended by adding at the end thereof the following: — Provided, that the maximum amount of insurance which may be issued to any one person by five or more such banks shall not

exceed in the aggregate five thousand dollars, exclusive of dividends or profits, and the maximum yearly payments to any one person under annuity contracts issued by five or more such banks shall not exceed four hundred dollars.

SECTION 2. This act shall take effect upon its passage."

The writing of policies of insurance and annuity contracts is a business so clothed with public interest that it may be regulated by the Legislature for the public welfare, under its general police power, in a wide variety of ways. Almost all such reasonable regulations interfere with perfect freedom of the exercise of the right to make contracts, both as to the individual insured and the insurer, but as a proper exercise of the police power such interference does not violate the constitutional guarantees of State constitutions or of the Federal Constitution. Such regulations, to be constitutional, must not be arbitrary or unreasonable.

The doing of an insurance business by savings banks was first authorized by the Legislature in 1907, and the manner and mode of conducting such business by these banks is regulated and limited in a wide variety of ways by enactments now embodied in G. L., c. 178, as amended. The system laid down by the Legislature heretofore for the conduct of the business by these banks differs in many particulars from that under which insurance companies are permitted to carry on business under the provisions of G. L., c. 175, as amended.

Among other regulations provided in G. L., c. 178, as amended, for the conduct of the business by savings banks, section 10 of said chapter now provides the following: —

"No savings and insurance bank shall write any policy binding it to pay more than one thousand dollars, exclusive of dividends or profits, upon the death of any one person, except for such amount, if any, as it may be bound to pay upon the death of such person under an employees' group policy, nor any annuity contract binding it to pay in any one year more than two hundred dollars, exclusive of dividends or profits."

The existing law thus limits the amount which any savings bank may hazard upon a single risk, either by way of a policy of insurance or a contract of annuity. The proposed bill limits the amount of the hazard which the savings banks engaged in this business, as an entire group, may venture upon a single risk. If such limitation be necessary to protect the interests of those seeking this particular form of insurance, as well as the insurers, as a provision making for the solvency of the insurers and the safety of the funds to which the insureds are to look for payment upon their contracts, it could not well be said that a legislative measure establishing such a limitation was unreasonable or arbitrary. The determination of the amount of such limitation best adapted to secure such solvency, if fixed by the sound judgment of the Legislature at either of the figures mentioned in your communication, could not, in view of the exercise of the judgment of the Legislature, be said to be arbitrary or unreasonable.

Whether such limitations as are created by the proposed bill are reasonable for accomplishing the purpose which I have above referred to is for the determination of the General Court. If it so determines, I cannot say that such a bill, if enacted into law, would be unconstitutional.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Retirement System — Penal Institutions Officer — Duration of Service.

The Commissioner of Correction may retire and place on the pension roll a penal institutions officer entitled to such retirement under G. L., c. 32, § 46.

FEB. 23, 1929.

Mr. EDWARD C. R. BAGLEY, *Deputy Commissioner of Correction.*

DEAR SIR: — You have sent me the following communication: —

"I respectfully refer you to an opinion rendered by a former Attorney General, dated May 12, 1919, relative to the retirement status of a man employed at the Massachusetts Reformatory. This man will attain the age of seventy on January 27, 1929, and has been advised by the Board of Retirement that he must leave the service of the Commonwealth on that date.

In the light of the opinion above referred to will you be kind enough to advise me whether this man is entitled to be retired under the prison officers' retirement law, G. L., c. 32, § 46, or is ineligible to any retirement allowance, as assumed by the Board of Retirement."

You have also submitted to me certain correspondence, from which I assume the facts to be that the person referred to in your letter was first employed at one of the State penal institutions from June 1, 1890, until January 5, 1907; that he then resigned and was absent from the service until re-employed in such an institution on May 10, 1915, and that when so re-employed in 1915 he was over fifty-five years of age.

There can be no question but that the person referred to has been, since attaining the age of sixty-five, eligible to retirement from the service and to have his name placed upon a pension roll, with the approval of the Governor and Council, under the provisions of G. L., c. 32, §§ 46–48, as amended, which relate peculiarly to prison employees. It is specifically provided in section 47 that in computing the twenty years of service for the Commonwealth, which render a prison employee eligible to the pension mentioned in section 46, all the time which he has served in the penal institutions of the State shall be counted, irrespective of whether such service was continuous or not. An opinion of one of my predecessors in office, rendered to you May 12, 1919 (not published), relative to a similar case, makes this plain; but such opinion did not hold that because an employee or officer of a penal institution was eligible for retirement under the particular provisions now embodied in G. L., c. 32, §§ 46–48 (formerly St. 1908, c. 601, as amended), he was also entitled, in addition to such pension, to receive a retiring allowance, or that he was eligible to be a member of the State Retirement Association if over fifty-five years of age at the time of his last re-entry into the service of the Commonwealth. Moreover, it has been held in an opinion of a former Attorney General (V Op. Atty. Gen. 456) that where an employee has ceased by voluntary retirement to hold a position in the service of the State and subsequently re-enters it, his term of service, for the purposes of obtaining the benefits of the retirement system, begins with the date of his re-employment, and that, as the continuity of his service has been broken by his resignation, the term of his prior employment is to be disregarded by the Board of Retirement.

The first plan for a comprehensive retirement system for the em-

ployees of the Commonwealth was enacted by St. 1911, c. 532, and after a series of amendments it was consolidated in G. L., c. 32, with other provisions relative to pension systems for certain classes of employees, enacted by other statutes, among which were the provisions for employees in penal institutions, contained in St. 1908, c. 601, as amended. Employees such as those in penal institutions, as the law now stands, are, when eligible to the benefits of the State retirement law, given the advantage of an option between retiring under the general provisions of the retirement law or under those applicable to their particular class. V Op. Atty. Gen. 634. Their eligibility to the advantages of the general retirement system is governed by the provisions applicable directly thereto, and particular provisions of those sections of the statutes which relate to eligibility to special pension funds do not control or govern their eligibility to the benefits of the general retirement system.

The person to whom you refer in your letter re-entered the service of the Commonwealth in its penal institutions in 1915. He was then over fifty-five years of age. Having attained such age he was not then eligible to membership in the State Retirement Association or entitled to the benefits of the retirement system in that respect. St. 1911, c. 532, § 3 (2), as amended, now G. L., c. 32, § 2 (2) and (3). He was, however, as I have pointed out, eligible to the benefits of the pension provided for penal institution employees by St. 1911, c. 608, now G. L., c. 32, §§ 46–48.

He was also subject to the provisions of St. 1911, c. 532, § 3, as amended, now G. L., c. 32, § 2 (2), to the effect that "no such person (employee) shall remain in the service of the Commonwealth after reaching the age of seventy."

This provision of chapter 32 applies, as part of the comprehensive scheme for the regulation of the retirement of persons in the service of the Commonwealth, to all such persons alike, irrespective of whether or not they are entitled to the advantage of a pension.

The provisions of G. L., c. 32, are intended to, and do, forbid a person employed by the Commonwealth from remaining in the service after reaching the age of seventy (see opinion rendered the Commissioner of Public Works March 19, 1921, not published), with the exception of those persons mentioned in G. L., c. 32, § 2 (3), namely, an "officer elected by popular vote" or "any employee who is or will be entitled to a non-contributory pension from the commonwealth." Admittedly, the person in question does not fall within the exception extended to elective officers nor does he fall within the second exception. It cannot be said that under the provisions of G. L., c. 32, §§ 46–48, "he is or will be entitled to a non-contributory pension." The pension provided for by section 46 is non-contributory, but it cannot presently be said that he "either is or will be entitled" thereto within the meaning of said chapter 32, section 2 (3). It is optional with the Commissioner of Correction to retire him from service and place him upon a pension roll, and the act of the Commissioner in this respect is subject to the approval of the Governor and Council (see V Op. Atty. Gen. 634).

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles and Trailers — Length — Permits.

No commercial motor vehicle with an extreme over-all length of twenty-eight feet may be operated upon a State highway without a special permit.

Groups of vehicles having altogether an over-all length of twenty-eight feet do not require a special permit.

Feb. 23, 1929.

Hon. Frank E. Lyman, *Commissioner of Public Works.*

Dear Sir: — You have directed my attention to G. L., c. 90, § 19, which, as finally amended by St. 1927, c. 72, reads as follows: —

"No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a state highway or a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load."

You have asked my opinion as to its interpretation in connection with the issuing of the special permits.

Gen. St. 1919, c. 252, §§ 2 and 3, which was the original act dealing with the subject matter of said section 19, was as follows: —

"Section 2. The Massachusetts highway commission, as to state highways, and the county commissioners, as to county highways, may likewise grant permits under this act.

Section 3. Any person violating any provision of this act, or of the terms of any permit granted hereunder, shall be punished by a fine of not more than one hundred dollars for each offence."

The provisions of said Gen. St. 1919, c. 252, were originally embraced in G. L., c. 90, § 19, in substantially the same terms, in the following words: —

"No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way, except that such a vehicle exceeding twenty-eight feet may be operated when a special permit so to operate is secured from the superintendent of streets, selectmen, or local authorities, having charge of the repair and maintenance of highways in the several cities and towns, or in the case of state highways, from the commissioner of public works, and in the case of other highways, from the county commissioners having jurisdiction thereof; provided, that the combined length of such a vehicle and trailer or trailers, or of two or more such vehicles fastened together in series, with or without trailers, may exceed twenty-eight feet, but in no event shall such combined length exceed sixty-five feet. All of the aforesaid dimensions shall be inclusive of the load."

The words of the proviso as contained in said section 19 were omitted when it was amended by St. 1925, c. 180, § 1, which read as follows: —

"Section 1. Chapter ninety of the General Laws is hereby amended by striking out section nineteen and inserting in place thereof the fol-

lowing: — *Section 19.* No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches, shall be operated on any way. No commercial motor vehicle, motor truck or trailer, the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load."

Nor have the words of the proviso been restored by subsequent legislation.

It follows, then, from the wording of G. L., c. 90, § 19, as it now stands amended, that any commercial motor vehicle, motor truck or trailer, the extreme over-all length of which exceeds twenty-eight feet, may not be operated, without a special permit from you as Commissioner of Public Works, upon a State highway or a way determined to be a through route, and the necessity for such a permit is not removed by the fact that such a vehicle is fastened together with others, irrespective of what the combined length of all the vehicles may be. Nor does a single vehicle, of the types mentioned in the statute, which is not itself over twenty-eight feet in length require a special permit for operation even if it be fastened together with other vehicles, all of which together have a length of over twenty-eight feet. Nor does a group of vehicles fastened together, none of the units of which exceeds twenty-eight feet in length, require a special permit.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Fire Marshal — Licenses and Permits — City Council.

Licenses and permits under G. L., c. 148, § 31, as amended, and licenses under G. L., c. 148, § 14, as amended, may be issued by a head of the fire department and a city council, jointly, if they have been designated for that purpose by the Fire Marshal.

FEB. 25, 1929.

GEN. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You have asked my opinion relative to delegation of authority by the Fire Marshal to issue licenses and permits under G. L., c. 148, § 31, as amended, and to issue licenses under G. L., c. 148, § 14, as amended. Your question reads as follows: —

"The question upon which your opinion is desired is: Can a designation be made by the Marshal including the city council and the head of the fire department to grant such licenses, so that one document only will be required?"

Section 14 provides for the issuance of permits by the Marshal "or by some *official* designated by him for that purpose." Section 31 provides for delegation by the Marshal to "the head of the fire department or *to* any other designated *officer*" in a city or town in the metropolitan district.

The terms "official" and "officer," as used in these two sections, are, in my opinion, to be construed as including the plural. See G. L., c. 4,

§ 6, cl. 4th. In *Foss* v. *Wexler*, 242 Mass. 277, the delegation was to the mayor and the board of street commissioners, and no question was raised on this point.

Nor do I think that the use of the word "or" in section 31 excludes the possibility of delegation to a head of the fire department and some other official jointly. The word "or" may be given a conjunctive as well as disjunctive meaning, and should be so construed here, for certainly it was not intended that, although a delegation might be made to any two other officials jointly, the head of the fire department could be designated only in the event that he should act alone. Nor could it have been intended that the power to make a joint delegation, including the head of the fire department, should be different under section 31 from what it is under section 14.

I am not certain what is meant by the last part of your question, viz.: "so that one document only will be required." If by "document" you refer to notice of the designation, I would say that written notice of the designation must be given to the head of the fire department and also to the city council. If you refer to the license or permit issued by the officials designated, there not only may be, but should be, only one document issued by the head of the fire department and the city council jointly.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Food — Fish — Cold Storage — Advertising.

The provisions of G. L., c. 94, § 78, as to advertisements, do not require that cold storage fish shall be designated as such, but they do forbid representation of the commodity as fresh fish.

The word "fish," as used in St. 1928, c. 40, § 1, includes all forms of fish and shellfish and crustacea.

FEB. 25, 1929.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion as to whether or not, in advertising or other forms of publicity, cold storage fish must be so designated as to distinguish it from fresh fish.

G. L., c. 94, § 78, is as follows: —

"No person shall sell, offer or expose for sale fish which have been held in cold storage, without notice to purchasers that such fish have been so held, nor without the conspicuous display of a sign marked 'Cold Storage Fish'; nor shall any person represent or advertise or sell cold storage fish as fresh fish."

G. L., c. 94, § 74, as amended by St. 1922, c. 17, § 1, provides, in part, as follows: —

"All fresh food fish before being offered for sale or placed in cold storage shall be graded as follows: —

. . . . . .

No person shall represent, sell, offer for sale or advertise fresh or frozen fish of any grade under any but the truthful and correct name and grade or corresponding term for such fish."

The words "advertising or other forms of publicity," as used in your question, may be somewhat ambiguous, and you may mean to include in

these words some specific case in which it would be possible to construe the form of publicity as an offer; in which case, of course, notice that the fish offered has been held in cold storage is required by the statute. An advertisement, however, in the sense in which that word is commonly used, will usually be construed by the courts, not as an offer, but as an invitation for offers. See Williston on Contracts, § 27. And, in any event, it is clear that the word "advertise," as used in the two sections of the statute above quoted, is used as distinct from "offer." Assuming, then, as I must, that your question refers only to advertisements or forms of publicity which are not in law offers, I answer your question in the negative.

The requirement of section 78 as to advertisements is merely that cold storage fish shall not be represented as fresh fish. An advertisement of fish, without more, is not a representation that it is fresh fish, as distinguished from cold storage fish. Nor is there anything in section 74 which leads to a different result. The words "name" and "grade" have no reference, as the preceding part of section 74 clearly shows, to any distinction between fresh and cold storage fish.

You also ask my opinion as to whether or not the word "fish," as used in St. 1928, c. 40, § 1, includes all forms of fish, such as fresh, frozen, cold storage, salted, pickled or otherwise preserved, and all shellfish and crustacea. Said section, amending G. L., c. 94, § 82, makes it criminal to sell for food purposes fish which is unwholesome or unfit for food. I think that shellfish and crustacea were intended to be, and well may be, included under the term "fish" as used in this statute. Provisions relating to these types are contained in G. L., c. 130, entitled "Fisheries." See also *Weston* v. *Sampson*, 8 Cush. 347. Nor do I think that this statute makes any distinction as between fresh fish and fish that is salted, pickled or preserved. The purpose of the statute, namely, to guard against the sale of impure food, applies to all equally. Accordingly, I answer your second question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Trust Company — Increase of Capital Stock — Stockholder.

Stockholders of trust companies may, under G. L., c. 172, § 18, as amended, and G. L., c. 156, §§ 41 and 44, authorize an increase of capital stock under such terms and in such manner as the directors or officers may determine.

MARCH 22, 1929.

Hon. ROY A. HOVEY, *Commissioner of Banks.*

DEAR SIR: — You have asked my opinion as to whether stockholders of a trust company have power under the terms of G. L., c. 172, § 18, as amended, to authorize its board of directors or officers to dispose of an increase of capital stock under such terms and in such manner as the board or officers may determine.

G. L., c. 172, § 18, as amended by St. 1926, c. 239, as it relates to the increase of capital stock by trust companies, reads as follows: —

"Any such corporation may, subject to the approval of the commissioner, increase its capital stock in the manner provided by sections forty-one and forty-four of chapter one hundred and fifty-six."

G. L., c. 156, §§ 41 and 44, read as follows: —

"Section 41. Every corporation may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, authorize an increase or a reduction of its capital stock and determine the terms and manner of the disposition of such increased stock, or authorize such terms and manner of disposition to be determined in whole or in part by the board of directors or officers of the corporation, may authorize a change of the location of its principal office or place of business in this commonwealth or a change of the par value of the shares of its capital stock, or may authorize proceedings for its dissolution under section fifty of chapter one hundred and fifty-five. Such increased stock may in whole or in part be disposed of without being offered to the stockholders. Any corporation having authorized shares with par value may, at a meeting duly called for the purpose, by the vote of a majority of all its stock, or, if two or more classes of stock have been issued, of a majority of each class outstanding and entitled to vote, including in any event a majority of the outstanding stock of each class affected, change such shares or any class thereof into an equal or greater number of shares without par value, or provide for the exchange thereof pro rata for an equal or greater number of shares without par value; provided, that the preferences, voting powers, restrictions and qualifications of the outstanding shares so changed or exchanged shall not be otherwise impaired or diminished without the consent of the holders thereof.

. . . . . .

Section 44. If an increase in the total number of the capital stock of any corporation shall have been authorized by vote of its stockholders in accordance with section forty-one, the articles of amendment shall also set forth — (*a*) the total amount of capital stock already authorized; (*b*) the amount of stock already issued for cash payable by instalments and the amount paid thereon; and the amount of full paid stock already issued for cash, property, services or expenses; (*c*) the amount of additional stock authorized; (*d*) the amount of such stock to be issued for cash, property, services or expenses, respectively; (*e*) a description of said property and a statement of the nature of said services or expenses, in the manner required by section ten."

The statute which first provided for increase of capital stock of trust companies, St. 1905, c. 189, was couched in the following language: —

"A trust company may, subject to the approval of the board of commissioners of savings banks, increase its capital stock to the maximum amount allowed by section five of chapter one hundred and sixteen of the Revised Laws, in the manner provided for the increase of capital stock of business corporations under the provisions of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, and of acts in amendment thereof, relative to the increase of capital stock; *provided, however*, that no such stock shall be issued by any trust company until the par value thereof shall be fully paid in in cash."

Provision is made in the General Laws for a mode of disposition of increased capital stock with reference to corporations not subject to G. L., c. 156, when no other provision is made by law with relation thereto. This is contained in G. L., c. 155, § 20, and reads as follows: —

"If a corporation, not subject to chapter one hundred and fifty-six, increases its capital stock and no other provision therefor is made by law, its directors shall forthwith give written notice thereof to each stockholder who was such at the date of the vote to increase, stating the amount of the increase, the number of shares or fractions of shares of the new stock which such stockholder is entitled to take, and the time, not less than thirty days after the date of such vote, within which such new stock shall be taken; and, within said time, each stockholder may take at par his proportion of such new shares, according to the number of his shares at the date of such vote to increase. If, at the expiration of said time, any shares remain untaken, the directors shall sell them by public auction for the benefit of the corporation at not less than the par value thereof."

I am of the opinion that it was the intent of the Legislature, in providing by G. L., c. 172, § 18, as amended, that a trust company might increase its capital stock "in the manner provided by" G. L., c. 156, §§ 41 and 44, to make applicable to such company the provisions of said sections 41 and 44, not only as they refer directly to the method of increasing stock but as they refer to the manner of distributing or disposing of the same. The terms and manner of disposition are such an integral part of an increase of stock that a reference to increase of capital stock in the "manner provided" in sections 41 and 44 would seem, in the ordinary use of words, to include both, as set out in the designated sections. It follows that the terms of G. L., c. 155, § 20, are not applicable to increase of stock by a trust company, for which provision is made by law under said G. L., c. 156, §§ 41 and 44, incorporated by reference in G. L., c. 172, § 18, as amended.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Division of Animal Industry — Rules — Poultry — Animals.

G. L., c. 129, § 2, does not give authority to the Division of Animal Industry to make rules as to giving certificates as to the condition of poultry or animals.

MARCH 27, 1929.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You ask my opinion as to the validity of certain proposed rules of the Division of Animal Industry, one set relating to a disease of poultry known as salmonella pullorum, and the other to a disease of cattle known as Bang bacillus.

The proposed rules provide, in substance, that if an owner elects to submit his flock or herd to certain blood tests in a laboratory approved by the Director, and if such tests show freedom from the disease in question, and if the owner further observes certain requirements as to care and maintenance, the Division will issue to him a certificate that his flock or herd is free of the disease in question.

The power of the Division to make rules is set forth in G. L., c. 129, § 2, as follows: —

"The director may make and enforce reasonable orders, rules and regulations relative to the following: the sanitary condition of neat cattle, other ruminants and swine and of places where such animals are kept;

the prevention, suppression and extirpation of contagious diseases of domestic animals; the inspection, examination, quarantine, care and treatment or destruction of domestic animals affected with or which have been exposed to contagious disease, the burial or other disposal of their carcasses, and the cleansing and disinfection of places where contagion exists or has existed. No rules or regulations shall take effect until approved by the governor and council."

Nothing therein confers power to issue certificates, and such power cannot, in my opinion, be implied. The Legislature has specifically provided in section 20 that inspectors shall issue certificates in certain cases, but section 20 gives no authority for the procedure proposed. Moreover, it would appear that under the proposed rules the Division would have no first-hand knowledge of the fact which it undertook to certify. The blood tests are not made by the Division, nor is any provision made for the Division to ascertain the existence of the other facts which are supposed to exist in order to make a certificate proper.

As to the proposed set of rules relating to poultry, there is, in my opinion, an additional reason why they are invalid. The words "domestic animals," as used in G. L., c. 129, § 2, do not, I think, include poultry. The Division of Animal Industry succeeded to the powers of the Department of Animal Industry (Gen. St. 1919, c. 350, § 40), which succeeded to the powers of the Board of Cattle Commissioners and the Cattle Bureau (St. 1912, c. 608). The Cattle Bureau was given the powers of the Board of Cattle Commissioners (St. 1902, c. 116). The power of the Board of Cattle Commissioners to make rules is expressed in P. S., c. 90, § 13, as follows: —

"When such commissioners make and publish any regulations concerning the extirpation, cure, or treatment of animals infected with or which have been exposed to any contagious disease, such regulations shall supersede those made by mayors and aldermen and selectmen; and mayors and aldermen and selectmen shall carry out and enforce all orders and directions of the commissioners to them directed."

The authority here given to the Cattle Commissioners is over the same subject matter referred to in section 1 of said chapter 90, in the following words: "The mayor and aldermen of cities and the selectmen of towns, in case of the existence in this commonwealth of the disease called pleuropneumonia among cattle, or farcy or glanders among horses, or any other contagious or infectious disease among domestic animals, shall cause" the animals to be segregated, etc. It would seem that the term "domestic animals," as here used, was not intended to include poultry. This view is confirmed by the words of section 7, which provide that "they may cause every animal infected with any such disease, or which has been exposed thereto, to be forthwith branded upon the rump with the letter P". There is nothing in subsequent statutes tending to show that the term "domestic animals" was intended to be given a new meaning which might confer on the Cattle Commissioners the power or duty of passing rules affecting poultry. This is further confirmed, moreover, by the failure to include any poultry disease in the list of contagious diseases enumerated in R. L., c. 90, § 28 (St. 1911, c. 6).

Furthermore, it is to be noted that in a number of instances the Legislature has used the term "birds or poultry" in addition to "animals," so indicating that the word "animals" is not sufficiently inclusive. Thus in G. L., c. 180, § 2, "for encouraging the raising of choice breeds of domes-

tic animals and poultry"; in G. L., c. 131, § 2, "preservation of birds and animals"; in G. L., c. 130, § 2, "the laws relating to fish, birds, mammals and game." I do not mean to intimate that there may not be statutes in which the word "animals" may be construed as including birds or poultry; but, in my opinion, it is not so to be construed in G. L., c. 129, § 2.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Public Safety — Compressed Air Tank — Operation of Pneumatic Machinery.

A compressed air tank used merely for starting in initial motion one piston of a Diesel engine is comprehended within the meaning of G. L., c. 146, § 34, relative to tanks for the storing of compressed air.

MARCH 28, 1929.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You have asked my opinion upon the following matter: —

"Whether a compressed air tank setting in initial motion one piston of a Diesel engine may be considered as operating pneumatic machinery as specified in the law."

You have advised me of the following facts in connection therewith: —

"The method of using the compressed air contained in the tank is as follows:

For the purpose of starting the engine in the first instance, the compressed air contained in the tank is applied to a cylinder of the engine, compressing the air therein to a temperature of approximately 500 degrees Fahrenheit. A portion of oil at this instant is injected into the cylinder, the heat igniting the oil and causing combustion and explosion. The expansion of this cylinder compresses the next in a similar manner, and so on. The tank is used for the sole purpose of starting the engine. This method has been used for more than twenty-five years, but not to any considerable extent until about 1914, since which time these engines and tanks have been gradually coming into considerable use in place of steam engines."

The pertinent provisions of the statutes are as follows, G. L., c. 146, § 34: —

"No person shall install or use, or cause to be installed or used, any tank or other receptacle, except when attached to locomotives, street or railway cars, vessels or motor vehicles, for the storing of compressed air at any pressure exceeding fifty pounds per square inch, for use in operating pneumatic machinery, unless the owner or user thereof shall hold a certificate of inspection issued by the division, certifying that the said tank or other receptacle has duly been inspected within two years, or unless the owner or user shall hold a policy of insurance upon the said tank or other receptacle issued by an insurance company authorized to insure air tanks within the commonwealth, together with a certificate of inspection from an insurance inspector who holds a certificate of competency described in section sixty-two."

The Attorney General does not pass upon questions of fact, but if, as would appear from the statements in your letter, the motive power of the Diesel engine is not compressed air, the mere fact that compressed air from tanks is used in the initial process of starting the engine would, in my opinion, not be sufficient so that it could be said that a tank employed solely for the purpose of furnishing compressed air for such starting purposes was a tank for the storing of compressed air "for use in operating pneumatic machinery," within the meaning of the statute. The mere starting of machinery whose motive power thereafter is not pneumatic cannot fairly be said to be comprehended by the employment of the words "*use in operating pneumatic machinery.*" The words "operating" and "starting," as the former is used in the statute, are not synonymous. The intent of the Legislature, as expressed in the words of the statute, appears to be to provide for the adequate safeguarding of tanks storing compressed air which were to be used for something more than brief periods.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Water Supply — Cities.

The Legislature may constitutionally redistribute the burdens assumed under an agreement between different cities relative to a water supply.

APRIL 11, 1929.

Committee on Water Supply.

GENTLEMEN: — You request my opinion as to whether House Bill No. 932, entitled "An Act relative to water supply for the cities of Salem and Beverly," would, if enacted, be constitutional.

St. 1913, c. 700, § 3, provides that the payment of certain expenses incurred in connection with a joint water supply for Salem and Beverly should be apportioned two-thirds and one-third. The proposed bill amends this section by changing the apportionment to three-fourths for Salem and one-fourth for Beverly.

The argument that this proposed change is unconstitutional is based upon the contention, made in behalf of the city of Salem, that by action taken by the two cities under earlier statutes, which permitted Beverly to acquire a one-third interest in the water supply of Wenham Lake, a contract was created between the two cities which binds Beverly to bear one-third of the burden of providing and maintaining a joint water supply, and that the change proposed in the present bill impairs the obligation of that contract.

By St. 1864, c. 268, Salem was authorized to take, and did take, for the purpose of a water supply, Wenham Pond, in Wenham and Beverly, and certain lands and water rights in connection therewith. By section 15 of said act towns upon the line of works, including Beverly, were entitled to a reasonable use of the water upon paying an equitable compensation therefor. See also St. 1869, c. 380; St. 1877, c. 144.

By St. 1885, c. 294, Beverly was authorized to supply itself with water, and for that purpose to draw directly from Wenham Pond so much of the waters thereof and of the waters which flow into and from the same "as it may require." By section 10 it was provided that upon the establishment of independent works by Beverly, the town should pay to Salem

one-third of the expense theretofore sustained by Salem in connection with securing and preserving the water supply in Wenham Pond and also one-third of the expenses thereafter incurred by Salem at Beverly's request in securing and preserving the purity of the waters of said pond; and upon the payment by Beverly of one-third of the expense theretofore incurred, Salem should record a declaration of trust in or concerning "said lands, water rights and easements," declaring that "one undivided third part of the same is held in trust" for Beverly, and that Beverly is entitled "to the beneficial enjoyment of said one undivided third part thereof." Beverly paid the one-third, and Salem in 1888 recorded the declaration of trust, as provided for by the statute (Essex Deeds, book 1217, page 128).

By section 11 of said act of 1885, it was further provided that the town of Beverly may draw from said pond "such water as it may require," without compensation to the city of Salem; but that if for any reason the supply in said pond were "insufficient to supply the needs of said city and its inhabitants and of said town and its inhabitants," thereafter, "so long as the supply remains insufficient as aforesaid, said town shall take from said pond only so much water as shall bear the same proportion to the water taken by said city from said pond as the number of inhabitants of said town bears to the number of the inhabitants of said city."

By St. 1893, c. 364, Salem was authorized, for the purpose of providing an additional water supply for Salem and Beverly, to take certain additional waters and to convey them into Wenham Lake; and by section 10 it was provided that upon payment by Beverly of one-third of the expense, Salem should record a declaration of trust, declaring that one undivided third thereof was held in trust for Beverly and that Beverly is entitled to the beneficial enjoyment of the same. It is my understanding that such taking was made, that Beverly made the payment and that Salem filed the declaration of trust.

St. 1913, c. 700, created the Salem and Beverly Water Supply Board. By section 4 said board was authorized, for the purpose of providing for the supply for Salem and Beverly, to acquire waters from the Ipswich River, and to construct works and acquire other rights in connection therewith; and section 5 provided that such property and rights should vest in Salem and Beverly "as tenants in common in the proportion named in section three hereof" — *i.e.*, in the proportion of two-thirds and one-third. Payment of expenses so incurred by the board was to be made from a fund, established by section 16, which was created from the proceeds of the issuance of bonds and notes by Salem and by Beverly as requested by the board, "provided, that at no time shall said city (Beverly) be requested to issue said bonds or notes to an amount greater or less than one-half the amount so requested in the case of the city of Salem" (§ 14).

As to expenses incurred by the board in maintenance, care and operation, it is provided by section 19 that these shall be paid by the respective cities from current revenues derived from water rates or taxation, in the proportion named in section 3 — *i.e.*, two-thirds and one-third, for a term of five years; but that every five years thereafter the board shall determine the proportion, subject to right of appeal to the Superior Court.

Section 3 of said act of 1913, which the present bill aims to amend by changing the proportion from two-thirds and one-third to three-fourths and one-fourth, reads as follows: —

"All expenses, liabilities and damages incurred by said board in carrying out the purposes of this act shall be paid, except as hereinafter provided, by said cities in the proportion of one third by the city of Beverly and two thirds by the city of Salem, and payment shall be made in the manner provided in section seventeen from the fund established by section sixteen hereof."

The proposed amendment effects no change in the proportion of ownership in any property heretofore acquired, nor does it involve any readjustment of payments already made. Neither does it affect in any way the existing liability of the two cities for care and maintenance, either of property now owned in common or hereafter to be acquired, for that is determined by section 19 of the act. The sole effect, therefore, of the proposed change would be to impose a different allocation of the expense in the event that the board shall hereafter acquire additional property or construct additional works, as, for instance, a new reservoir at Putnamville, to which you refer.

If the Legislature decides that, as to this, justice requires a different apportionment of expense from that which has previously been applied in connection with the joint water supply of the two cities, I can see no constitutional objection to the enactment of a law to that effect. The fact that in the case of this proposed reservoir at Putnamville the water will presumably be drawn from there into Wenham Lake, does not, in my opinion, alter the case, especially since the right of the respective cities to draw water from Wenham Lake is not fixed by any apportionment, except in the unusual event of a shortage. (St. 1885, c. 294, § 11.) Under ordinary circumstances the right of the city of Beverly is to draw such water "as it may require" (St. 1885, c. 294, §§ 2 and 11), and the right of the city of Salem is no doubt the same.

Moreover, the Legislature has very broad powers in making readjustments of the rights and property of municipal corporations. In *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, 521, the court said: — "Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another public corporation." As the court in this case and in many others points out, the question is very different from that involved where the rights of individuals or quasi-public corporations are concerned.

In *Scituate* v. *Weymouth*, 108 Mass. 126, 131, the court said: — "It was an exercise of the authority of the legislature to distribute public burdens and duties. It is clear that, under the same constitutional power, it had the right to change the law and redistribute these public burdens, if from a change of circumstances or other reason it deemed it just and proper so to do."

See also *Cambridge* v. *Lexington*, 17 Pick. 222; *Attorney General* v. *Cambridge*, 16 Gray, 247; *Turners Falls Fire District* v. *Millers Falls Water Supply District*, 189 Mass. 265; *City of Boston, petitioner*, 221 Mass. 468; *Opinion of the Justices*, 234 Mass. 612, 616; *Selectmen of Brookline, petitioners*, 236 Mass. 260.

Indeed, the Legislature, by the act of 1913 here under consideration, has by section 19 apparently made provision for changing the distribution of the burden of care and maintenance from two-thirds and one-third to such proportion as the board should, after a five-year term,

decide to be proper; and the constitutionality of that provision seems not to have been questioned.

I would suggest, however, that House Bill No. 932 seems inadequate to effect the change intended, for the reason that payments are to be made from the fund, and section 14 of said act of 1913 would still provide that Beverly's contribution to the fund should be one-half that of Salem. If, therefore, the Legislature desires to change the allocation, section 14 and perhaps other sections of the act should be amended, in addition to section 3.

You also ask whether the city of Salem now has the legal right to take an unlimited quantity of water from Wenham Lake, which would prevent the city of Beverly from taking one-third of the water of said lake for water supply purposes. The answer to this question depends upon whether Beverly requires one-third of the water. As already stated, either city has the right to take as much as it requires, except in the event of a shortage, when the right is limited as provided in St. 1885, c. 294, § 11.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Charitable Trust Funds — Cy Pres.

An act is an unconstitutional invasion by the Legislature of the judicial function if it attempts to alter a trust agreement relative to the application of funds for a charitable purpose.

APRIL 11, 1929.

MR. ELMER L. MCCULLOCH, *House Chairman, Committee on Towns.*

DEAR SIR: — You have asked my opinion as to whether House Bill No. 737 would, if enacted into law, be constitutional. The act authorizes the Trustees of the School Fund in the Town of Hopkinton, a corporation organized under the provisions of an act approved June 17, 1820, to transfer and convey all its property to the town of Hopkinton, which, acting through its school committee, shall receive and apply said funds upon the same trusts as those upon which said trust funds and property are now held. The act further provides that the corporation shall thereupon be dissolved.

The act of 1820 creates the present trustees as a corporation for the purpose of holding and applying certain funds for school purposes. Those funds were apparently originally provided by certain public spirited inhabitants interested in the schools of the town, and the act of 1820 created a method of administering the fund, which method I assume to have been in conformity with the donors' wishes. The persons interested in the present act were not able definitely to trace the original source and history of this fund, and a somewhat limited investigation by this office has not aided materially. The question is therefore treated as if there was, prior to 1820, a gift for charitable uses to be administered for the purposes and in the manner described by the act of 1820.

If the act is unconstitutional, it is because of one or more of the following reasons: —

1. It impairs the obligation of the contract between the State and the corporation.

2. It impairs the obligation of the contract between the corporation and the donor or donors of the fund.

3. It is an attempted exercise of the judicial power by the Legislature.

1. The Legislature may not alter or repeal the charter of a corporation issued prior to 1831 without its consent. The present act, however, is dependent upon the assent of the corporation, and therefore cannot be said to be objectionable on the first ground.

2. It has repeatedly been held that a gift to a charitable corporation constitutes a contract between the corporation and the donor, and that any act impairing this agreement violates the Constitution of the United States. It is very probable that this act, dissolving the corporation by whom the trust is administered and causing the funds to be turned over to the town, may be contrary to the wishes and intent of the donor. It is not unlikely that the donor intended and desired that the management of the fund should be left in the hands of private persons rather than public officers, who might be influenced by political and personal motives. Assuming that the act of 1820 expresses the intent of the donor or donors of this fund, I am of the opinion that the constitutionality of this act would be open to grave doubt upon this ground.

3. Any material change in the objects of a charity or the agents by whom it is to be administered must be made by the courts, and then only if the original purposes are impossible or impracticable; further, the court must also find a dominant or general charitable intent on the part of the donor which is consistent with the contemplated changes. This action on the part of the court is generally referred to as the application of the *cy-pres* doctrine, and is exclusively a judicial function. *Cary Library* v. *Bliss*, 151 Mass. 364; *Opinion of the Justices*, 237 Mass. 613, 617.

The Legislature has a somewhat vaguely defined power over charitable trusts held by municipalities, and may authorize the conversion of real estate into personalty in certain cases, but beyond this, action in any given case which alters the original gift must be had by the judicial department. The court, in the case of *Ware* v. *Fitchburg*, 200 Mass. 61, decided that the Legislature had power to determine by statute who should be the agent of the city to administer a charitable fund left to it; the case does not hold that the Legislature may change the trustee or terminate a charitable corporation, and no case has come to my attention where this was properly done by the Legislature.

It follows that the act, in so far as it attempts to alter the trust agreement, is an unconstitutional invasion by the Legislature of an exclusively judicial function.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Public Health — Local Board of Health — Inspector — Appointment.

A city manager, in lieu of a mayor, has the duty to nominate an inspector of slaughtering to the Department of Public Health, but the approval of such nomination by the Department alone constitutes the appointment of the person so nominated.

APRIL 18, 1929.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion upon the following question: —

"Will you kindly inform me whether or not the city charter of Fall River removes from the board of health of Fall River the right to make a

nomination to this Department of a person for the position of slaughtering inspector, and, after such nominee has been approved, the right to make the appointment?"

You have advised me in connection with your inquiry that you have received the following communication from the city manager of Fall River: —

"April 6, 1929.

George H. Bigelow, M.D., *Commissioner of Public Health, State House, Boston, Massachusetts.*

Dear Sir: — The local board of health has recommended the appointment of Edward F. Carey, V.S., as inspector of slaughtering for the city of Fall River.

I do hereby notify you that under the present city charter it is mandatory for all appointments to be made by the city manager. Therefore I have on this date appointed Edward F. Carey, V.S., to said position.

Respectfully yours,

Edward F. Harrington,
City Manager."

The government of the city of Fall River is now carried on under Plan D, as set forth in G. L., c. 43, §§ 79–92. Under this plan it is provided that there shall be a "city manager" (§ 89), and he is given the authority, among other things, to "appoint and remove all heads of departments, superintendents and other employees of the city" (§ 90).

G. L., c. 43, §§ 79–92, providing for a special plan of city government, were not intended by the Legislature to override other existing provisions of the General Laws relative to appointments.

G. L., c. 129, § 15, provides as follows: —

"The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon."

As has been said with relation to animal inspectors generally, in an opinion given to the Commissioner of Conservation by my immediate predecessor in office (Attorney General's Report, 1928, pp. 69, 70): —

"Section 15 places an affirmative duty upon mayors and selectmen to nominate inspectors, and provides that the nominee shall not be appointed until approved by the Director of Animal Industry."

Approval of nominations of such inspectors as are termed inspectors of slaughtering rests with the Department of Public Health instead of with the said Director, by virtue of the terms of G. L., c. 94, § 128, which are as follows: —

"For the purposes of sections one hundred and nineteen, one hundred and twenty-five to one hundred and twenty-seven, inclusive, and one hundred and forty-seven, said inspectors shall be appointed and compensated, and may be removed, in the manner provided for inspectors of animals, under sections fifteen to seventeen, inclusive, of chapter one hundred and twenty-nine, except that in respect to such first named inspectors, local boards of health and the department of public health

shall perform the duties and exercise the authority imposed by said sections upon the aldermen or selectmen and upon the director of animal industry, respectively, as to inspectors of animals."

"First named inspectors," in said section, as appears by reference to the earlier sections of the same statute, are what are commonly termed inspectors of slaughtering, and as to them the Department of Public Health exercises a power of approving their nominations similar to that given to the Director with relation to other inspectors.

G. L., c. 94, § 126, refers to "an inspector appointed by the local board of health" as one who performs duties with relation to slaughtering. This may give rise to some confusion, which appears to result from the codification of the General Laws in 1921. Prior to such codification R. L., c. 90, § 12, had provided that "the mayor and aldermen in cities" should nominate inspectors of slaughtering. As the local boards of health were given authority to perform the duties of aldermen, they exercised a part, at least, in the power to appoint such inspectors. As the laws stand since the enactment of the General Laws, the power to nominate such inspectors is vested by said G. L., c. 129, § 15, in the mayors of cities.

Although the power of appointing the employees of cities under Plan D (G. L., c. 43, §§ 90, 91), has been taken from the mayor and vested in the city manager, there is not such repugnancy between G. L., c. 43, §§ 90 and 91, and G. L., c. 129, § 15, as works an implied repeal of the latter section or renders it inapplicable to the cities operating under said plan.

Although it is true that the mode of appointing inspectors has been transferred by said Plan D from the mayor to the manager, yet this difference does not involve a material variation from the procedure outlined in G. L., c. 129, § 15. The duty now rests upon a city manager, in lieu of a mayor, to make a nomination of an inspector of slaughtering to the Department of Public Health. Even though the naming of a person for such a position be called an appointment by the city manager, it is in effect only a nomination and is to be treated as such, and is subject to the approval of the Department. When the Department's approval has been given to the appointment of the person named, then, and not before then, the appointment may be validly made by the city manager. See Attorney General's Report, 1927, p. 155.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Labor Service — Rules.

The Commissioner of Civil Service is bound to provide rules for the registration and certification of laborers in Springfield, and these rules do not need to be approved by the municipality.

APRIL 18, 1929.

Hon. ELLIOT H. GOODWIN, *Commissioner of Civil Service.*

DEAR SIR: — You have asked my opinion upon the three following questions: —

"(*a*) Is the application of the rules governing the labor service, as

established by the Commission, with the approval of the Governor and Council, mandatory for the city of Springfield?

(*b*) If not, is action required by the Civil Service Commission in framing a new rule to be submitted to the Governor and Council?

(*c*) Is such action in any way subject to consideration or approval by the authorities of the city of Springfield?"

G. L., c. 31, § 3, provides: —

"The board shall, subject to the approval of the governor and council, from time to time make rules and regulations which shall regulate the selection of persons to fill appointive positions . . . and, except as otherwise provided in section forty-seven, the selection of persons to be employed as laborers or otherwise in the service of the commonwealth and said cities and towns. Such rules shall be of general or limited application, shall be consistent with law . . ."

Said section 47 referred to in section 3 is as follows: —

"This chapter shall continue in force in all the cities of the commonwealth and in all towns of more than twelve thousand inhabitants which have accepted corresponding provisions of earlier laws, and shall be in force in all such towns which hereafter accept it by vote at a town meeting. The provisions of this chapter and the rules established under it relative to employment of laborers designated as the 'labor service' shall not be in force in any city of less than one hundred thousand inhabitants, which has not heretofore accepted the corresponding provisions of earlier laws, until said provisions are accepted by the city council."

The provision in section 47 above quoted, that rules relative to employment of laborers shall not be in force in any city of less than 100,000 inhabitants is not intended to grant perpetual exemption from the rule making power, under said section 3, to any city which had such a population at the time of the enactment either of the General Laws or of the original statute containing a similar provision in 1896 (St. 1896, c. 449, amending St. 1884, c. 320). All cities in the Commonwealth have been at all times since the passage of said St. 1896, c. 449, subject to the general terms now embodied in said section 3, and when any one of them reaches a population of 100,000 the provisions and rules established under said section 3, relative to employment of laborers, become applicable to such a city. See St. 1884, c. 320, § 2.

Civil Service Rule 32, section 3, provides as follows: —

"The Commissioner shall provide for the registration and certification of laborers in the service of the Metropolitan District Commission and the city of Boston, and in other cities to which the labor rules are or may become applicable. The Commissioner may appoint persons to be registration clerks in such other cities."

Inasmuch as the city of Springfield now has a population in excess of 100,000, said Rule 32, section 3, is now applicable thereto, and from the terms of said Rule 32, section 3, it appears that it is mandatory upon the Commissioner to provide for the registration and certification of laborers in said city.

I therefore answer your question (*a*) in the affirmative.

This answer precludes the necessity of making a specific reply to your question (*b*).

The approval and acceptance of any particular laws is not made by the statutes a prerequisite to the establishment of rules relative to the employment of laborers in cities of over 100,000 inhabitants. I therefore answer your question (*c*) in the negative.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Governor and Council — State House — Radio Equipment.

The Governor and Council have the authority to approve the erection of a part of a radio equipment used by the Department of Public Safety upon the roof of the State House.

APRIL 29, 1929.

To His Excellency the Governor and the Honorable Council.

GENTLEMEN: — You have requested to be advised as to the authority of the Governor and Council to grant their approval to the erection of a steel tower to support an antenna, which is a part of the radio equipment used in the police work of the Department of Public Safety, upon the roof of the rear of the State House, such erection having been asked for by the Commissioner of said Department.

I am of the opinion that such an erection may properly be made if it meets with the approval of the Governor and Council.

G. L., c. 8, § 6, as amended by St. 1923, c. 362, § 10, provides, with relation to the authority of the Superintendent of Buildings, as follows: —

"He shall direct the making of all repairs and improvements in the state house and on the state house grounds. All executive and administrative departments and officers shall make requisition upon him for any repairs or improvements necessary in the state house or in other buildings or parts thereof owned by or leased to the commonwealth and occupied by said departments or officers. Such repairs or improvements shall be made only upon such requisition signed by the head of the department or office. This section shall not apply to state institutions or officers thereof."

G. L., c. 8, § 9, is, in part, as follows: —

"The superintendent shall, under the supervision of the governor and council, have charge of the care and operation of the state house and its appurtenances."

The erection of the steel tower may be said to fall within the terms of section 6 as an improvement in the State House, and I assume from the communication which you sent me that a requisition for the same, signed by the Department of Public Safety, has been made upon the Superintendent.

Inasmuch as the intent of the Legislature in enacting said section 9 was, obviously, to provide that the Governor and Council should have direct charge of the State House and its appurtenances, their approval should be given to the making of this contemplated improvement under the direction of the Superintendent of Buildings.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles — "Right to operate" — Revocation.

The right to operate a motor vehicle without ever having received a license, allowed by G. L., c. 90, § 10, as amended, may be revoked by the Registrar of Motor Vehicles, and any unlicensed operation thereafter may be punished.

May 8, 1929.

Hon. Frank E. Lyman, *Commissioner of Public Works.*

Dear Sir: — You have asked my opinion as to the interpretation of certain portions of the statutes concerning the operation of motor vehicles in the following communication: —

"I am requested by the Registrar of Motor Vehicles to secure an opinion as to the exact meaning or effect of the suspension of the *right* of any person to operate motor vehicles in the Commonwealth of Massachusetts, under G. L., c. 90, § 22, and whether that person may be prosecuted under section 23 of said chapter."

The pertinent portions of the statutes are quoted below.

G. L., c. 90, § 10, as amended by St. 1923, c. 464, § 4, provides: —

"No person shall operate a motor vehicle upon any way unless licensed under this chapter, except as is otherwise herein provided; but *this section shall not prevent the operation of motor vehicles by unlicensed persons if riding with or accompanied by a licensed operator*, excepting only persons who have been licensed and whose licenses are not in force because of revocation or suspension, persons whose right to operate has been suspended by the registrar, and persons less than sixteen years of age; but such licensed operator shall be liable for the violation of any provision of this chapter, or of any regulation made in accordance herewith, committed by such unlicensed operator; provided, that the examiners of operators, in the employ of the registrar, when engaged in their official duty, shall not be liable for the acts of any person who is being examined. During the period within which a motor vehicle of a non-resident may be operated on the ways of the commonwealth in accordance with section three, such vehicle may be operated by its owner or by his chauffeur or employee without a license from the registrar if the operator is duly licensed under the laws of the state in which he resides, or has complied fully with the laws of the state of his residence respecting the licensing of operators of motor vehicles; but if any such non-resident or his chauffeur or employee be convicted by any court or trial justice of violating any provision of the laws of the commonwealth relating to motor vehicles or to the operation thereof, whether or not he appeals, he shall be thereafter subject to and required to comply with all the provisions of this chapter relating to the registration of motor vehicles owned by residents of the commonwealth and the licensing of the operators thereof. A record of the trial shall be sent forthwith by the court or trial justice to the registrar. This section shall apply to the operation of all vehicles propelled by power other than muscular power, except railroad and railway cars, road rollers, and motor vehicles running only upon rails or tracks."

G. L., c. 90, § 22, as amended by St. 1923, c. 464, § 6, provides: —

"The registrar may suspend or revoke any certificate of registration or any license issued under this chapter, after due hearing, for any cause which he may deem sufficient, and he may suspend the license of any

operator or the certificate of registration of any motor cycle in his discretion and without a hearing, and may order the license or registration certificate to be delivered to him, whenever he has reason to believe that the holder thereof is an improper or incompetent person to operate motor vehicles, or is operating improperly or so as to endanger the public; and neither the certificate of registration nor the license shall be reissued unless, upon examination or investigation, or after a hearing, the registrar determines that the operator should again be permitted to operate. *The registrar, under the same conditions and for the same causes, may also suspend the right of any person to operate motor vehicles in the commonwealth under section ten* until he shall have received a license from the registrar."

G. L., c. 90, § 23, as finally amended by St. 1927, c. 267, § 2, provides: —

"*Any person convicted of operating a motor vehicle* after his license to operate has been suspended or revoked or *after notice of the suspension of his right to operate a motor vehicle without a license has been issued* by the registrar and received by such person or by his agent or employer *and prior to the restoration of such license or right to operate or to the issuance to him of a new license to operate*, and any person convicted of operating or causing or permitting any other person to operate a motor vehicle after the certificate of registration for such vehicle has been suspended or revoked and prior to the restoration of such registration or to the issuance of a new certificate of registration for such vehicle, shall, except as provided by section twenty-eight of chapter two hundred and sixty-six, *be punished* for a first offence by a fine of not less than fifty nor more than one hundred dollars or by imprisonment for not more than ten days, or both, and for any subsequent offence by imprisonment for not less than ten days nor more than one year, and any person who attaches or permits to be attached to a motor vehicle a number plate assigned by the registrar to another vehicle, or who obscures or permits to be obscured the figures on any number plate attached to any motor vehicle, or who fails to display on a motor vehicle the number plate and the register number duly issued therefor, with intent to conceal the identity of such motor vehicle, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than ten days, or both."

The proper construction of the statutes with relation to the subject matter of your inquiry will ultimately be one for judicial determination, but for your guidance and that of the Registrar of Motor Vehicles I state that my opinion is that "the *right* of any person to operate motor vehicles in the Commonwealth under section ten until he shall have received a license from the registrar," mentioned in the last sentence of G. L., c. 90, § 22, refers to the right to operate accorded by G. L., c. 90, § 10, to (1) unlicensed persons riding with or accompanied by a licensed operator who are not within the classes of persons specifically excepted from the enjoyment of such right by said section, and (2) non-residents, unlicensed in this Commonwealth, under certain circumstances set forth in said section. Any of such persons who operates a motor vehicle after his right to operate, as defined above, is suspended by the action of the Registrar, under said section 22, may be prosecuted under the provisions of said section 23.

In other words, the right to operate, referred to in the last sentence of said section 22, is the right to operate without ever having received a license, and when such right is lost by the action of the Registrar further

unlicensed operation of any sort, whether the specific kind enjoyed under the particular "right" or not, pending restoration of such right, subjects the person to the penalties appropriate for such offence set forth in said section 23. A similar interpretation is to be applied to the words "after his right to operate without a license has been suspended," as used in G. L., c. 266, § 28, as amended by St. 1926, c. 267, § 1, reading as follows: —

"Whoever steals an automobile or motor cycle, or receives or buys an automobile or motor cycle knowing the same to have been stolen, or conceals any automobile or motor cycle thief knowing him to be such, or conceals any automobile or motor cycle knowing the same to have been stolen, or takes an automobile or motor cycle without the authority of the owner and steals from it any of its parts or accessories, or without the authority of the owner *operates an automobile or motor cycle after his right to operate without a license has been suspended* or after his license to operate has been suspended or revoked and prior to the restoration of such right or license to operate or to the issuance to him of a new license to operate, shall be punished by imprisonment in the state prison for not more than ten years or imprisonment in jail or house of correction for not more than two and one half years."

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Commissioner of Correction — Officer — Pension.

With relation to certain employees of the Department of Correction only "officers" may be retired on a pension, and a preliminary determination as to whether an applicant for a pension is an officer must be made by the Commissioner.

MAY 17, 1929.

Hon. SANFORD BATES, *Commissioner of Correction.*

DEAR SIR: — You ask my opinion on the following question: —

"A man, employed at the Reformatory for Women since January, 1894, under various titles but doing practically the same kind of work, largely disciplinary cases with the inmates, has asked for a ruling as to whether or not he is eligible for retirement under the prison officers' retirement act, G. L., c. 32, § 46. He contends that while he has not been listed as an officer of the institution he has in fact been the only disciplinary officer there since his appointment, and therefore should be eligible for retirement as an officer."

G. L., c. 32, § 46, as amended by St. 1921, c. 403, and St. 1926, c. 343, § 7, provides: —

"The commissioner of correction may, with the approval of the governor and council, retire from active service and place upon a pension roll any officer of the state prison, the Massachusetts reformatory, the prison camp and hospital, the state farm, the reformatory for women or any jail or house of correction, or any person employed to instruct the prisoners in any prison or reformatory, as provided in section fifty-two of chapter one hundred and twenty-seven, or any other employee of the state prison, the Massachusetts reformatory or the prison camp and hospital, who has attained the age of sixty-five and who has been employed in prison service in the commonwealth, with a good record, for not less than twenty years; or who, without fault of his own, has become

permanently disabled by injuries sustained in the performance of his duty; or who has performed faithful prison service for not less than thirty years; . . . and provided, that no such officer, instructor or employee shall be retired unless he began employment as such in one of the above named institutions, or as an officer or instructor in one of those named in the following section, on or before June seventh, nineteen hundred and eleven. The word 'officer', as used in this and the two following sections, shall extend to and include prison officer, correction officer and matron."

It is clear that the only employees of the Reformatory for Women eligible for a pension under the foregoing statute are officers, which term includes "prison officer, correction officer and matron," and instructors.

In an opinion of a former Attorney General, dated February 24, 1914 (not published), in which he had occasion to consider St. 1908, c. 601, as amended by St. 1911, c. 673 (the original statute providing for the retirement and pensioning of officers and instructors and other employees in penal institutions of the Commonwealth), he defined the word "officer," as used therein, to mean "those persons who are employed to, and who as a regular part of their duties do, have charge either of all or a definite number of persons committed to prison, jail or reformatory by legal process."

St. 1921, c. 403, enlarged the scope of the law relative to retiring and pensioning all prison officers by defining the word "officer" to include "prison officer, watchman and matron." The term "watchman" was stricken out by St. 1926, c. 343, § 7, and the words "correction officer" were substituted. The additions and elisions made by these statutes do not, in my opinion, alter the definition quoted above.

In a later opinion of another Attorney General (V Op. Atty. Gen. 227) it was said, in speaking of said definition: —

"This seems to me to be an appropriate definition of the term, and, in my opinion, it should be employed in determining who are officers in the prison service, within the meaning of the statute under consideration. . . .

If an employee is appointed and carried on the pay roll as an officer, that fact may, *prima facie*, entitle him to the benefits of this statute, though it is not conclusive. Calling a clerk an officer, of course, cannot make him such. Nor does the fact that an employee may occasionally, as an incidental part of his work, have some supervision over a few of the prisoners who are assigned to work in his department make him an officer. It must be a regular and substantial part of his duty to have charge and control of prisoners in order to bring him within the definition of prison officers to which I have referred. Thus, the engineers, assistant engineers and stewards or cooks cannot, in my opinion, be regarded as officers merely because prisoners are from time to time assigned to work in their departments under their direction. Again, persons appointed as, and in the main performing the duties of, clerks are not officers unless in addition they perform substantial duties of the character indicated in this definition of prison officers."

It would seem, therefore, that this resolves itself into a question of fact in each individual case, and whether or not a person is an officer must be determined by the Commissioner of Correction before such person can be pensioned.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Marriage and Divorce — Records — Corrections.

City or town clerks' records of marriages may not be expunged but may be corrected.

The validity of a marriage is not determined by the records of a city or town clerk.

Decrees of nullity as to marriages are not required to be filed with city or town clerks.

May 23, 1929.

Hon. Frederic W. Cook, *Secretary of the Commonwealth.*

Dear Sir: — You have requested my opinion upon the following questions: —

"1. Can the record of a marriage which is subsequently annulled by decree of court, or voided without a decree of divorce or other legal process as provided in G. L., c. 207, § 8, be expunged from the record books of a city or town clerk or registrar?

2. If such record cannot be expunged and such marriage stands as a matter of record, must either party to such marriage, in making written notice of intention of another marriage, state that such subsequent marriage is his or her second marriage?

3. Must a copy of the decree, if any, be filed with the notice of intention of marriage?"

1. There do not appear to be any provisions of the statutes which provide for the expunging of records of a marriage kept by city or town clerks. Correction of such records may be accomplished, however, in the manner described in G. L., c. 46, § 13, as amended by St. 1925, c. 281, § 2, which reads as follows: —

"If the record relating to a birth, marriage or death does not contain all the required facts, or if it is claimed that the facts are not correctly stated therein, the town clerk shall receive an affidavit containing the facts required for record, if made by a person required by law to furnish the information for the original record, or, at the discretion of the town clerk, by credible persons having knowledge of the case. If a person shall have acquired the status of a legitimate child by the intermarriage of his parents and the acknowledgment of his father, as provided in section seven of chapter one hundred and ninety, the record of his birth may be amended or supplemented hereunder so as to read, in all respects, as if such person had been reported for record as born to such parents in lawful wedlock. For such purpose, the town clerk shall, if satisfied as to the identity of the persons and the facts, receive an affidavit executed by the parents or by either if the other is dead, setting forth the material facts. Unless the marriage is recorded in the records in the custody of such clerk, such affidavit shall be accompanied by a certified copy of the record thereof. He shall file any affidavit submitted under this section and record it in a separate book kept therefor, with the name and residence of the deponent and the date of the original record, and shall thereupon draw a line through any incorrect statement, or statements, sought to be amended in the original record, without erasing them, shall enter upon the original record the facts required to correct, amend or supplement the same and forthwith, if a copy of the record has been sent to the state secretary, shall forward to the state secretary a certified copy of the corrected, amended or supplemented record upon blanks to be

provided by him, and the state secretary shall thereupon correct, amend or supplement the record in his office. Reference to the record of the affidavit shall be made by the clerk on the margin of the original record. If the clerk furnishes a copy of such record, he shall certify to the facts contained therein as corrected, amended or supplemented, and shall state that the certificate is issued under this section, a copy of which shall be printed on every such certificate. Such affidavit, or a certified copy of the record of any other town or of a written statement made at the time by any person since deceased required by law to furnish evidence thereof, may, in the discretion of the clerk, be made the basis for the record of a birth, marriage or death not previously recorded, and such copy of record may also be made the basis for completing the record of a birth, marriage or death not containing all the required facts."

Under the foregoing provisions the city or town clerk is not required to initiate action for the correction of marriage records, nor are there any special requirements relative to such corrections in relation to marriages which have been recorded but which are void.

With relation to the facts which are required to be recorded by said clerks to make up such marriage records, it is provided by G. L., c. 46, § 1, as follows: —

"Each town clerk shall receive or obtain and record in separate columns the following facts relative to births, marriages and deaths in his town:

. . . . . .

In the record of marriages, date of record, date of marriage, place of marriage, name, residence and official station of the person by whom solemnized, names and places of birth of the parties married, residence of each, age and color of each, the number of the marriage (as first or second) and if previously married, whether widowed or divorced, the occupation of each and the names of their parents, and the maiden names of the mothers. If the woman is a widow or divorced, her maiden name shall also be given."

If a marriage which has been recorded under the terms of said chapter 46, section 1, is a void marriage, an affidavit containing facts showing that it is void, accompanied by a certified copy of a decree of nullity entered by a court of competent jurisdiction under the provisions of G. L., c. 207, § 14, if any such there be, although not required, might well be made "by a person required by law to furnish the information for the original record or at the discretion of the town clerk by credible persons having knowledge of the case," and the clerk would be required to receive it. Such affidavit would then be filed by the clerk in the manner described in said G. L., c. 46, § 13, as amended. The clerk would then make such corrections, amendments, references and supplements on and in the original records as said section 13 requires.

If this be done the void character of the marriage will appear of record, and confusion with relation thereto in the future will be obviated. A city or town clerk, however, as I have said, has no authority to "expunge" the record of a marriage.

2. I answer your second question in the negative. The validity or invalidity of a marriage is not determined by the records of a city or town clerk relating to such a marriage. If a ceremony has not resulted in a valid marriage, a subsequent marriage of either of the parties to such

ceremony is a first marriage as to him or her, irrespective of what appears upon the records of a city or town clerk concerning the facts connected with the first ceremony. See in this connection VII Op. Atty. Gen. 728.

3. I answer your third question in the negative. The filing of a copy of a decree of nullity, either in connection with a correction of a record of a marriage subsequently shown to have been void, or with a notice of intention of marriage subsequent thereto, would tend to make records in the offices of city and town clerks more accurate, but such filing is not required by the terms of any statute.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Milk — Misbranding — Prosecution.

Misbranding of milk by the use of the word "Guernsey" on a container when the milk is not from Guernsey cattle and is inferior to the product known as Guernsey, may be prosecuted.

MAY 23, 1929.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion as to whether misbranding of milk by the use upon the container of the word "Guernsey" in connection with milk, when the milk is inferior to the product known as Guernsey milk and not in fact obtained from Guernsey cattle, may be prosecuted under the provisions of G. L., c. 94, § 187. I am of the opinion that it may be so prosecuted.

The general definition of food, in section 1 of said chapter 94, is broad enough to cover milk. The specific sections of chapter 94, which deal with improperly labeling milk, such as sections 18 and 19, relate to misleading names applied to grades and qualities of milk different in character from those comprehended in the definition of "misbranded," as used in said section 187.

As originally enacted, that portion of G. L., c. 94, entitled "Adulteration and misbranding of food and drugs," contained in section 185 an exclusion from the operation of the ten following sections of various commodities, including milk and cream.

By St. 1921, c. 486, § 26, section 185 was repealed, and there is now no specific statutory limitation of the words "article of food" or "food" as used generally in section 187. Of course, the ultimate decision of your question is one for judicial determination in relation to any particular prosecution which may be started.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Laborers — Contracts — Public Works — Payments.

Contractors engaged in the construction or repair of any water or electric light works, pipes or lines may not contract with their workmen to pay less often than once a week.

MAY 24, 1929.

Gen. E. LEROY SWEETSER, *Commissioner of Labor and Industries.*

DEAR SIR: — You have asked my opinion as to whether it is legal for a contractor who is doing work for the Commonwealth to pay less often than weekly such of his employees as may request in writing to be paid in a different manner.

The law pertinent to the question is contained in G. L., c. 149, § 148, as most recently amended by St. 1925, c. 165. There is no restriction in this respect upon contractors doing work for the Commonwealth as such. The section, however, does apply to contractors engaged in certain enumerated types of work, among which is "the construction or repair of any . . . water or electric light works, pipes or lines." The company to which your letter refers is apparently engaged in the construction of the works in connection with the taking of the Swift and Ware rivers, and therefore would come under the prohibition contained in the statute.

In my opinion, a company engaged in any of the types of work enumerated in the statute must pay its employees weekly, and may not avoid this duty by contract with the employee or otherwise. That part of the section which permits payment to be made in a different manner, if the employee in writing so requests, applies only to cases involving employment by the Commonwealth or a county, city or town, and cannot be construed to apply to employees of private companies, whether they are or are not doing work for the Commonwealth. It follows, therefore, that your question should be answered in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Department of Public Health — Investigation — Barbers.

Under a resolve of the Legislature the Department of Public Health has authority to investigate barbering wherever practiced.

JUNE 10, 1929.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR: — You have asked my opinion relative to the duties of your Department under Resolves of 1929, chapter 43, in the following language: —

"Chapter 43 of the Resolves of 1929, recently passed, directs this Department to investigate the matter of barbering in the Commonwealth. In defining what constitutes 'barbering,' singeing, dyeing and various manipulations of and applications to the face are mentioned. Such procedures are practiced in so-called beauty parlors. I should like to know whether, in your opinion, this definition of 'barbering' extends the scope of our investigation to this latter type of establishment."

Resolves of 1929, chapter 43, reads as follows: —

"*Resolved*, That the department of public health is hereby authorized and directed to investigate the need, as a health measure, for establishing a board of registration of barbers or otherwise regulating the practice of barbering. For the purposes of the investigation, a barber shall be construed to be any person who, for hire, shaves or trims the beard, cuts the hair, gives facial or scalp massage or facial or scalp treatment with oils, creams or other preparations, or singes or shampoos the hair or applies any hair tonics or dyes to the hair of any person and who is not a registered physician or a registered embalmer; and the performance of any such service shall be construed as practising barbering. In connection with its investigation the department shall consider the subject matter of house document numbered one hundred and eighty-one of the current year, and shall make such examination of the sanitary condition of barbering establishments and the practices of barbers as it deems necessary.

Said department shall report to the general court its findings and its recommendations, if any, together with drafts of such legislation as may be necessary to carry its recommendations into effect, by filing the same with the clerk of the house of representatives not later than the first Wednesday of December in the current year. Said department may expend for the aforesaid purpose such sum, not exceeding three thousand dollars, as may hereafter be appropriated by the general court."

By the terms of this resolve your investigation is to be directed to a determination of the need, as a health measure, for establishing a board of registration of barbers, or otherwise regulating the practice of barbering, and you are also directed to consider the subject matter of House Document No. 181, dealing with the same subject, and in connection therewith to make such examination of the sanitary condition of barbering establishments and the practices of barbers as your Department may deem necessary. A definition of "barber," for the purpose of the investigation, is set forth in the resolve. There is no definition of "barber shop" or of "beauty parlor" contained in the resolve.

You have authority, and it is your duty under this resolve, to investigate the practice of barbering, as defined in the resolve, in whatever place such barbering may be practiced. In so far as it may be carried on in beauty parlors, the practice of barbering there is properly subject to your investigation; and it is possible that the relation of the general type of business conducted in the beauty parlor to barbering, as this affects the sanitary condition of the latter, may require your investigation.

You have no authority under this resolve to investigate beauty parlors as such, but whenever the practice of barbering, as defined in the resolve, is carried on therein that practice and the surroundings which affect it may well be considered by you.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Corporations — Fee — Certificate of Change in Stock.

The fee under G. L., c. 156, § 54, as amended, is to be figured at one cent per share for additional shares without par value.

JUNE 11, 1929.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You request my opinion as to the fee to be charged for filing a certain certificate relating to a change in authorized stock of a certain corporation.

The certificate, or articles of amendment, in question provides for the issuance of 6,000 shares of common stock without par value, in addition to 6,000 shares without par value originally authorized and now outstanding, and also provides for the retirement of 3,000 shares of preferred stock, which you state to have a par value of $100.

G. L., c. 156, § 54, as amended by St. 1928, c. 360, § 2, reads as follows: —

"The fees for filing and recording the following certificates shall be as follows:

For filing and recording a certificate providing for an increase of capital stock with par value, one twentieth of one per cent of the amount by which the capital is increased; but not in any case less than twenty-five dollars.

For filing and recording a certificate providing for a change of shares with par value to shares without par value, whether or not the capital is changed thereby, one cent for each share without par value resulting from such change, less an amount equal to one twentieth of one per cent of the total par value of the shares so changed; but not in any case less than twenty-five dollars.

For filing and recording a certificate providing for an increase in the number of shares without par value, whether or not the capital is changed thereby, one cent for each additional share; but not in any case less than twenty-five dollars."

You state that the attorney for the corporation contends that the net result of the transaction in question is a reduction of capitalization, and that therefore the fee should be $10.00, as provided in section 55 for certificates other than those covered by section 54.

But in determining whether an increase of capitalization is effected, shares without par value are to be treated as having a par value of $100 (see V Op. Atty. Gen. 570), and therefore the present transaction results in a net increase rather than in a reduction.

Furthermore, under the amendment of 1928, above quoted, the fee in the case of additional shares without par value does not appear to be dependent upon a net increase in capitalization being effected. In the case of shares without par value the law as it previously existed (see *Commonwealth* v. *United States Worsted Co.*, 220 Mass. 183; G. L., c. 156, § 54) has been changed by the amendment of 1928. The reduced fee of one cent per share is expressly made independent of the question "whether or not the capital is changed thereby." It is clear that the transaction in question, involving, as it does, the issuance of additional shares without par value, comes within the provisions of section 54, as amended.

It might be questioned whether the certificate comes under the provisions of paragraph 3 or of paragraph 4 of section 54, as amended. You assume in your letter that it comes under the fourth paragraph, if under either, and I think that that assumption is correct. Paragraph 3 refers to "a change of shares with par value to shares without par value"; and it cannot be said of the present transaction that any outstanding stock of par value is being changed to stock without par value. The new stock is to be issued for cash; it is not to be exchanged for the preferred, which is retired.

The present certificate provides for an increase in the number of shares "without par value," and therefore comes within paragraph 4. It may seem that the corporation should receive a deduction on account of the preferred stock retired, and that the fee should be figured only upon net increase of capitalization, as would have been done under section 54 before the amendment. That would make the fee $30.00. Or perhaps it may be thought that a deduction should be given at the rate of five cents per share upon the stock retired, as is provided in paragraph 3. That would make the deduction $150, and therefore make the fee the minimum of $25.00. But, in my opinion, under the words of paragraph 4 the fact that the preferred stock is being retired can have no bearing upon the amount of the fee, which is to be figured upon the increase in the number of shares without par value. If the Legislature had intended the fee under paragraph 4 to be based upon the amount by which the capital is increased, it would have said so, as it did in connection with paragraph 2; or if it had intended to give a deduction because of a retirement of other stock, it would have said so, as it did in connection with paragraph 3.

In my opinion, therefore, the fee in the present case must be figured at one cent per share for the additional 6,000 shares without par value, that is, $60.00.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Agriculture — Retailer of Seeds — Name.

The name of the retailer of agricultural seeds must appear on every package of seeds, however put up.

JUNE 12, 1929.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR: — You ask my opinion on certain questions relative to G. L., c. 94, as amended by St. 1927, c. 274, in the following language: —

"G. L., c. 94, §§ 261A, 261B, 261C and 261E, require that the name and address of the vendor be shown on containers of agricultural seeds or mixtures of agricultural seeds. The question arises as to who the vendor of the agricultural seeds is when there has been a sale of such seeds in the Commonwealth. Many of the seeds that are sold have the name and address of the wholesaler on the package, and a large amount of seeds that are sold have the name and address of the wholesaler on the tag fastened to the large container from which the seeds are sold in smaller packages.

It is the contention of many of those who have been requested to appear with reference to reported violations of our seed law that the name and address of the wholesaler satisfies the law as to the requirement for the name and address of the vendor of such seeds or mixtures. Your opinion is therefore requested as to who is the vendor in the sale of agricultural seeds or mixtures thereof in the State of Massachusetts.

Sections 261A, 261B and 261C indicate that agricultural seeds or mixtures of agricultural seeds shall have affixed thereto in a conspicuous place on the exterior of the container of such seeds or mixtures a plainly written or printed tag or label with a statement in the English language of certain required information. The question has arisen as to the interpretation of the word 'container.' . . .

This Department is interested in the interpretation of the word 'container.' . . . The question of importance, therefore, is whether or not the word 'container' refers to the package that is handed over the counter to the vendee in a sale of agricultural seeds or mixtures thereof."

G. L., c. 94, as amended by St. 1927, c. 274, § 2, provides: —

"SECTION 261A. Every lot of agricultural seeds of ten pounds or more, except as otherwise provided in sections two hundred and sixty-one B to two hundred and sixty-one L, inclusive, shall have affixed thereto, in a conspicuous place, on the exterior of the container of such agricultural seeds, a plainly written or printed tag or label in the English language, stating:

. . . . . .

(f) Name and address of the vendor of such agricultural seed."

Sections 261B, 261C and 261E, added to G. L., c. 94, by St. 1927, c. 274, § 2, contain similar provisions with reference to the information to be written or printed on the tag or label to be affixed to the container.

Section 261L, added to said chapter 94 by the 1927 statute, provides: —

"Whoever sells, offers or exposes for sale, any lot of agricultural seeds, or mixtures of agricultural seeds, without complying with the requirements of sections two hundred and sixty-one A to two hundred and sixty-one K, inclusive, or falsely marks or labels such agricultural seeds or mixtures thereof or vegetable seeds, or impedes, obstructs or hinders the commissioner of agriculture or any of his duly authorized agents in the discharge of the authority or duties conferred or imposed by any provision of said sections, shall be punished by a fine of not more than five hundred dollars."

G. L., c. 4, § 6, provides: —

"In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

. . . . . .

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."

I am of the opinion that the words "container" and "vendor," as used in the statute above quoted, are to be given their ordinary meaning. The word "container" means a package of any description capable of holding the various seeds described in the statute. Said package may be in the form of a box made of wood, tin, cardboard, fibre, etc., or it may consist of a paper bag ordinarily used in retail stores. The word "vendor," as used in said statute, must be construed to mean a person, firm or corporation which actually sells within the Commonwealth the seeds described in the statute.

The statute applies equally to producer, wholesaler or distributor and retailer of agricultural seeds if he engages in business in this Commonwealth. The tag or label required to be affixed to the container must have written or printed thereon all of the information required by this statute. This applies to the retailer who sells the seeds within the Commonwealth, notwithstanding the fact that the seeds which he sells may have been put up in packages by the producer, wholesaler or distributor doing business within or without the Commonwealth, and that tags or labels bearing the name and address of such wholesaler, producer or distributor are plainly printed in the English language and affixed to said containers. In other words, the name of the retailer must appear on every package of seeds whether the seeds are contained in packages put up by the producer, wholesaler or distributor or put up in a "paper bag package." This contention is clearly supported by the last paragraph of St. 1927, c. 274, § 2 (G. L., c. 94, § 261L).

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Election Commission of Lowell — Appointment of Clerk — Civil Service.

An appointment of a clerk by the election commission of Lowell is not under the Civil Service Rules.

June 24, 1929.

Hon. Elliot H. Goodwin, *Commissioner of Civil Service.*

Dear Sir: — You request my opinion as to whether the appointment of a clerk by the election commission of the city of Lowell is within the civil service.

The appointment is made under St. 1920, c. 154, § 4, which provides that the election commission "may employ such persons as they may deem necessary in the performance of their duties: *provided, however,* that among the persons so employed after the passage of this act, the two dominant political parties shall at all times be equally represented."

In my opinion, the provision which makes party affiliation a qualification leads to the conclusion that the appointment was not intended to be within the civil service. G. L., c. 31, § 10, provides:

"No question in any examination shall relate to political or religious opinions or affiliations, and no appointment to a position or selection for employment shall be affected by them."

The Civil Service Commission, therefore, has no official means of knowing which, if any, of the persons whose names appear upon its list are eligible for the appointment. Moreover, even if it did know, it could not make a selection for certification, for it is required to certify names in the order of standing upon the eligible list. G. L., c. 31, §§ 15 and 23; Civil Service Rule 16. The civil service laws and rules do not fit the case in question.

This conclusion is confirmed by the fact that the appointment of assistant registrars by the election commission of Boston, under St. 1913, c. 835, § 80, which provided, similarly to the statute now in question, that the two leading political parties should be equally represented in appointments, was recognized as not within the civil service; and also by the fact that when the Legislature, by St. 1920, c. 305, placed such appointments by the Boston commission within the civil service it was thought necessary at the same time to alter the civil service law to fit the situation, which was done by providing in section 2 of the 1920 statute that an applicant must file with the Civil Service Commission a certificate of party enrollment.

Yours very truly,
Joseph E. Warner, *Attorney General.*

Medical Examiner — Absence — Associate.

Absence of a medical examiner sufficient to authorize an associate examiner to perform his duties is not restricted to absence from the Commonwealth of the former official.

June 25, 1929.

Hon. Charles R. Clason, *District Attorney for the Western District.*

Dear Sir: — It was held by one of my predecessors in office, in an opinion given to the medical examiner in the Third Bristol District, dated April 11, 1917 (not published), that actual absence of a medical examiner

from his district was not required in order to authorize associate medical examiners to act. It was pointed out that "the administration of the law in relation to medical examiners ordinarily requires prompt action, and therefore the determination of when the associate medical examiner should act in place of the medical examiner must depend upon the facts arising in each case."

G. L., c. 38, § 2, reads: —

"Associate examiners in the other counties" (exclusive of Suffolk) "shall, in the absence of the medical examiners or in case of their inability to act, perform in their respective districts all the duties of medical examiners."

Apparently my predecessor, in construing the Revised Laws, where similar language was used, felt, as I do, that there might be situations, other than the actual absence of the medical examiner from the district, in which the associate was authorized to perform the former's duties. I think that section 16 of said chapter 38, with relation to the duties of the associate examiners, should be construed, in the light of section 2, with the meaning which I have indicated.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Supervisor of Public Records — Custody — Rules.

The Supervisor of Public Records has authority to approve specifications of a safe for the preservation of records, and may make rules relative thereto.

JUNE 27, 1929.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion as to whether or not the Supervisor of Public Records is authorized to establish or approve specifications of fireproof safes or vaults to be used for the safe-keeping of public records, and also to promulgate rules and regulations for the manufacture, construction and use of such fireproof safes or vaults.

G. L., c. 66, § 1, provides as follows: —

"The supervisor of public records . . . shall take necessary measures to put the records of the commonwealth, counties, cities or towns in the custody and condition required by law and to secure their preservation. . . ."

Section 11 of said chapter 66 provides as follows: —

"Officers in charge of a state department, county commissioners, city councils and selectmen shall, at the expense of the commonwealth, county, city or town, respectively, provide and maintain fireproof rooms, safes or vaults for the safe-keeping of the public records of their department, county, city or town, other than the records in the custody of teachers of the public schools, and shall furnish such rooms with fittings of noncombustible materials only."

While this last section imposes a duty upon the various officers to keep public records in fireproof safes or vaults, I am of the opinion that under section 1 the Supervisor of Public Records has authority to determine what is a proper fireproof safe or vault, and that such safe or vault must cor-

respond with specifications which he may approve. Section 1 gives him the power to secure the preservation of such records and to see to it that they are kept in the custody and condition required by law. This duty imposed by this section cannot be successfully carried out unless the Supervisor has the power to decide and determine the specifications of such a safe or vault. If, in his opinion, a safe or a vault is not fireproof or otherwise proper, it is my opinion that it may not be used for the keeping of public records. I do not believe that the Supervisor may approve specifications of manufacturers or can in any way determine questions arising out of the manufacture of these safes or vaults, as his only concern is their use as a container for public records.

Under section 1 he also has the power to promulgate reasonable rules and regulations concerning the use and construction of such safes or vaults, as this obviously is one of the "necessary measures" to secure the preservation of the records.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Sentence — State Farm — Indeterminate Sentence.

A prisoner committed to the State Farm may be held in custody for two years under an indeterminate sentence.

JUNE 28, 1929.

Dr. A. WARREN STEARNS, *Commissioner of Correction.*

DEAR SIR: — You have addressed the following communication to me, setting forth certain facts relative to a person committed to the State Farm:

"A person was committed to the State Farm May 8, 1929, from the District Court in Malden, for the offence of 'refusing to work while an inmate of a city home,' under G. L., c. 117, § 22, which specifically states that the sentence shall be for one year.

G. L., c. 279, § 36, states: 'In imposing a sentence of imprisonment at the state farm, the court or trial justice shall not fix or limit the duration thereof.'

Said section 36 also states: 'Whoever is sentenced to the state farm for drunkenness may be there held in custody for not more than one year, and if so sentenced for any other offence may be there held in custody for not more than two years.'

In view of the above two apparent inconsistencies in the law, and in view of the ruling of the Supreme Court in *Platt* v. *Commonwealth*, 256 Mass. 539, I write to ask you for an opinion as to whether this man's maximum sentence should be one year or two years for the above offence."

I assume, for the purposes of this opinion, although you do not definitely so state, that the sentence of the judge in the District Court was a sentence for an indefinite period to the State Farm, and that the judge did not himself in the sentence attempt to fix a definite period for such confinement. I gather from your communication that the sentence was imposed under the provisions of G. L., c. 117, § 22, which reads as follows: —

"Whoever refuses or neglects to perform any labor required of him under the two preceding sections, or who, while performing such labor, wilfully

damages any property of the town requiring the same, shall be punished, in Suffolk county by imprisonment in the house of correction for not more than one year, and in other counties, in the house of correction or at the state farm for a like term."

The original enactment, which is now embodied in said section 22, is St. 1895, c. 445, § 3, which reads as follows: —

"Whoever refuses or neglects to perform any labor required of him as aforesaid, or while performing such labor wilfully damages any property of the city or town requiring the performance of such labor, shall on conviction thereof by any court or magistrate having jurisdiction of the offence be punished by imprisonment not exceeding one year in the house of correction or at the state farm, or, in the county of Suffolk, in the house of correction or house of industry."

This statute of 1895 was incorporated in the Revised Laws as section 24 of chapter 81, as follows: —

"Whoever refuses or neglects to perform any labor required of him under the provisions of the two preceding sections, or while performing such labor wilfully damages any property of the city or town requiring the same, shall be punished, in the county of Suffolk, by imprisonment in the house of correction for not more than one year, and in other counties, in the house of correction for a like term, or at the state farm."

Subsequent to the enactment of said statute of 1895, St. 1898, c. 443, was enacted, which, in section 1, reads as follows: —

"When a convict is sentenced to the state farm the court or trial justice imposing the sentence shall not fix or limit the duration thereof. Whoever is so sentenced for drunkenness may be held in the custody of said state farm for a term not exceeding one year, and whoever is so sentenced for any other offence may be held in such custody for a term not exceeding two years."

Section 4 of said chapter 443 provides as follows: —

"All acts and parts of acts inconsistent with this act are hereby repealed."

Said St. 1898, c. 443, § 1, is now embodied in G. L., c. 279, § 36, which is as follows: —

"In imposing a sentence of imprisonment at the state farm, the court or trial justice shall not fix or limit the duration thereof. Whoever is sentenced to the state farm for drunkenness may be there held in custody for not more than one year, and if so sentenced for any other offence may be there held in custody for not more than two years."

At the time of the imposition of the sentence to which you refer in your communication, under the terms of said G. L., c. 279, § 36, the judge could not impose any sentence to the State Farm except an indeterminate one, under which a person convicted of a crime other than drunkenness might be held in custody for a term not exceeding two years. The judge might have adopted the alternative course of a sentence to the house of correction for one year, but if he elected to sentence to the State Farm the sentence was governed by the provisions of said G. L., c. 279, § 36, the original terms of which were enacted in 1898, and which in that year

superseded the terms of St. 1895, c. 445, § 3, which contained the original of the provisions of said section 22.

It is provided in G. L., c. 281, § 2, that: —

"The provisions of the General Laws, so far as they are the same as those of existing statutes, shall be construed as a continuation thereof and not as new enactments."

The provisions of R. L., c. 81, § 24, and of G. L., c. 117, § 22, above referred to, indicate that they were clearly intended as a continuation of the original enactment of the statute of 1895, and the effect of the statute of 1895 had long since been altered by the enactment of said St. 1898, c. 443, already referred to, wherein the provisions for indefinite sentence to the State Farm were incorporated and all earlier acts repugnant thereto were repealed. The present provisions of the General Laws (c. 117, § 22) continue the effect of the provisions of the statute of 1895 as they existed subsequent to the passage of St. 1898, c. 443, and are to be read with a consideration of the language used in both of such statutes.

It was said by the Supreme Court in *Moulton* v. *Commonwealth*, 215 Mass. 525, 527: —

"If, however, an earlier statute is repugnant to the subsequent act the presumption is, that the latter statute is intended as the final expression of the legislative will, and the former statute is necessarily repealed by implication."

Moreover, it is a general principle of statutory interpretation that a body of laws enacted at one time, as were the General Laws, is to be construed so as to constitute, so far as practicable, an harmonious entity. *Brooks* v. *Fitchburg & Leominster St. Ry. Co.*, 200 Mass. 8. And the Supreme Judicial Court, in *Platt* v. *Commonwealth*, 256 Mass. 539, 543, has said: —

"The history of legislation shows that the General Court in comparatively recent years has established the indeterminate sentence to exist alongside the definite sentence as to many offences. The underlying design of the indeterminate sentence is to subject the offender to reformative influences, to rescue for useful citizenship one started on a criminal career and thus enable him to assume right relations with society. It is manifest that the bringing back to upright conduct of one embarked upon evil courses cannot commonly be easily or quickly accomplished. Time is required for the operation of physical, industrial, mental and moral training and education essential to the work of reclamation of human beings.

There have been superimposed by the Legislature, upon its statutes requiring sentences for specifically defined terms of incarceration upon a finding or verdict of guilty as to misdemeanors like the present, the newer statutes relative to the indeterminate sentence. These several provisions are not contradictory and incompatible, but constitute a consistent frame of law. It has been left to the court to determine on the evidence in each case whether the purely punitive sentence for a specified period, or the indefinite sentence with a reformative purpose even though invoking longer restraint, is better for the common welfare."

If, as I have said, the trial judge in pronouncing sentence had desired to avail himself of that portion of the law which permitted a definite sentence of one year, he might have done it by a sentence to the house of

correction. If he elected to adopt the use of the indefinite sentence, as he apparently did, he could not set the term thereof (G. L., c. 279, § 36), and by the provisions of said G. L., c. 279, § 36, which control the limits of the indeterminate sentence, the prisoner committed thereunder may be held in custody for not more than two years.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Marriage Records — Certificate — Death Records — Diseases.

The date of a certificate of the filing of intention of marriage should be the date of its issue.

Diseases which are the cause of a death should be entered upon the death records of municipal clerks and the Secretary of the Commonwealth.

JUNE 28, 1929.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion upon certain questions of law relative to various sets of facts which you have set forth in a letter to me.

Your first question is as follows: —

"G. L., c. 207, § 28, provides that 'on or after the fifth day from the filing of notice of intention of marriage . . . the clerk or registrar shall deliver to the parties a certificate,' and that 'if such certificate is not used it shall be returned to the office issuing it within six months after it is issued.'

Some clerks mail the certificate on the fifth day after the intention has been filed, dating the certificate on that date. Other clerks do not date the certificate until it is called for, in some cases several months (possibly years) after the date of filing the notice of intention.

What is to be considered the date a certificate is issued?"

G. L., c. 207, § 28, reads as follows: —

"On or after the fifth day from the filing of notice of intention of marriage, except as otherwise provided, the clerk or registrar shall deliver to the parties a certificate signed by him, specifying the date when notice was filed with him and all facts relative to the marriage which are required by law to be ascertained and recorded, except those relative to the person by whom the marriage is to be solemnized. Such certificate shall be delivered to the minister or magistrate before whom the marriage is to be contracted, before he proceeds to solemnize the same. If such certificate is not used, it shall be returned to the office issuing it within six months after it is issued."

I am of the opinion that the date on which a certificate is issued is the date of its delivery to the parties referred to in the said section. The date written upon the certificate by the clerk may well be considered prima facie evidence of the date of such delivery, but it would appear to be the proper course for the clerk or registrar to follow to date the certificate upon the day of delivery.

Your second question is as follows: —

"If a city or town clerk or the Secretary of the Commonwealth has received facts relative to a death, giving gonorrhœa or syphilis as the

disease or cause of death, is he prohibited from entering such facts in the record of death and from subsequently issuing a certificate containing said facts?"

G. L., c. 46, § 1, relative to facts to be recorded by city and town clerks, in its pertinent parts reads as follows: —

"Each town clerk shall receive or obtain and record in separate columns the following facts relative to births, marriages and deaths in his town:

. . . . . .

In the record of deaths, date of record, date of death, name of deceased, sex, color, condition (whether single, widowed, married or divorced), supposed age, residence, occupation, place of death, place of birth, names and places of birth of the parents, maiden name of the mother, disease or cause of death, defined so that it can be classified under the international classification of causes of death . . ."

The provisions of G. L., c. 111, § 119, are as follows: —

"Hospital, dispensary, laboratory and morbidity reports and records pertaining to gonorrhœa or syphilis shall not be public records, and the contents thereof shall not be divulged by any person having charge of or access to the same, except upon proper judicial order or to a person whose official duties, in the opinion of the commissioner, entitle him to receive information contained therein. Violations of this section shall for the first offence be punished by a fine of not more than fifty dollars, and for a subsequent offence by a fine of not more than one hundred dollars."

These provisions do not relate to the public records relative to deaths which are required to be kept by city and town clerks, under G. L., c. 46, or by the Secretary of the Commonwealth, and their prohibitions have no application to such records.

I therefore answer your second question in the negative.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Massachusetts Agricultural College — Trustees — Expenditures — Committee.

No person not a member of the board of trustees of the Massachusetts Agricultural College may be appointed to serve on a committee of that body to deal with expenditures.

JUNE 29, 1929.

Mr. R. W. THATCHER, *President, Massachusetts Agricultural College.*

DEAR SIR: — You ask my opinion on the question of whether or not G. L., c. 75, § 5, "gives the trustees of the Massachusetts Agricultural College the right to appoint a committee to authorize expenditures consisting of others than members of this Board."

G. L., c. 75, § 5, provides: —

"Expenditures for maintenance shall be authorized by the trustees or by their duly appointed committee. The expenditure of special appropriations shall be directed by such trustees, and shall be authorized and accounted for as are appropriations for maintenance."

Prior to May 31, 1918, the Massachusetts Agricultural College was a public charitable corporation organized for educational purposes by vir-

tue of St. 1863, c. 220, and amendments thereof. By said statute the Legislature reserved certain rights, among which was the right to alter, limit, annul or restrain the powers vested in said corporation. See III Op. Atty. Gen. 308; 460.

By Gen. St. 1918, c. 262, the Legislature exercised the right reserved in said St. 1863, c. 220, and dissolved the corporation, and the Commonwealth took over said college, thenceforth to be maintained as a State institution under the name of "Massachusetts Agricultural College." Gen. St. 1918, c. 262, also prescribed the powers and duties of the trustees, and in section 4 provided: —

"All expenditures for the maintenance of the institution shall be authorized by a majority of the trustees, or by a majority of a duly appointed committee of the trustees. . . . The expenditure of special appropriations shall be under the direction and control of the trustees, and shall be accounted for in the same manner as appropriations for maintenance."

In the rearrangement and consolidation of the General Laws the present language of the statute was adopted, but the elisions made by the commissioners in charge of said rearrangement do not affect the original intent of the Legislature.

I am of the opinion that the words "or by their duly appointed committee" are to be construed to mean "or by a majority of a duly appointed committee of the trustees," and that the trustees of the Massachusetts Agricultural College have not "the right to appoint a committee to authorize expenditures consisting of others than members" of the board of trustees.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Auditor — Civil Service — Veteran.

A veteran appointed to the Auditor's office under St. 1920, c. 428, and St. 1921, c. 380, when not, as a matter of fact, employed under the civil service law, may be removed without a hearing.

JULY 1, 1929.

Hon. ALONZO B. COOK, *Auditor of the Commonwealth.*

DEAR SIR: — You request my opinion as to whether a veteran appointed and employed in your Department under St. 1920, c. 428, and St. 1921, c. 380, is entitled to a hearing in the event of your discontinuing his employment.

In my opinion, he is not. Said chapter 380 provides for the continued employment of the employee in question "notwithstanding any civil service rules to the contrary." Moreover, it is my understanding that the employee in question was not originally appointed and never has been employed under the civil service law. This being so, he cannot avail himself of G. L., c. 31, § 26, which provides that no veteran shall be removed except after hearing, for that statute has been construed as applying only to veterans appointed under the civil service law. *Ayers* v. *Hatch*, 175 Mass. 489; *Bates* v. *Selectmen of Westfield*, 222 Mass. 296; VII Op. Atty. Gen. 90.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Joint Special Committee — Clerk of a Senate Committee — Wages or Salary.

The clerk of the Senate Committee on Rules and assistant to the President of the Senate may not, while drawing his salary for such position, receive compensation for work as secretary of a joint special committee.

JULY 2, 1929.

His Honor WILLIAM S. YOUNGMAN, *Chairman, Committee of the Executive Council on Finance, Accounts and Warrants.*

DEAR SIR: — You have asked my opinion upon the following question: —

"Eugene W. Mason was employed as clerk of the Senate Committee on Rules and assistant to the President of the Senate for the year 1929, at an annual salary of $3,000. The joint special committee created by order of the Legislature to investigate civil service laws, rules, etc., under date of June 25, 1929, have advised His Excellency the Governor and the Honorable Council that they desire to employ Eugene W. Mason for special legislative work as secretary of their committee, at a compensation not to exceed $1,000, payable at the rate of $150 a month, dating from July 1, 1929.

The Committee desires to know whether the Council may legally approve the proposed payments to Eugene W. Mason for the special legislative work above described."

I am advised that Mr. Mason's duties as clerk of the Senate Committee on Rules and assistant to the President of the Senate do not cease with the prorogation of the annual session of the Legislature, but that he is still discharging the same and will be required to continue to do so, especially in relation to those pertaining to his work as assistant to the President of the Senate, throughout the current year, although they are not sufficient in amount fully to occupy his time during regular working hours, at least between July 1st and December 1st; and that Mr. Mason's salary is an annual salary, paid to him monthly throughout the year, and not in full at the close of the regular annual session of the General Court. Mr. Mason's situation in these respects does not resemble that of a member of the General Court, and the considerations relative to the latter in regard to a salary paid for services in another official capacity rendered after prorogation, as set forth in VI Op. Atty. Gen. 220, are not applicable to him.

Both sums which Mr. Mason would receive for his various forms of work, if the compensation as secretary of the joint special committee, referred to in your communication, were allowed him, would be payable out of the treasury of the Commonwealth.

G. L., c. 30, § 21, provides: —

"A person shall not at the same time receive more than one salary from the treasury of the Commonwealth."

There is undoubtedly sometimes a distinction between a salary and compensation, as when the latter word is used as a synonym for wages. This difference has been pointed out and defined in an opinion of one of my predecessors in office (V Op. Atty. Gen. 700), in which I concur, and from which I quote as follows: —

"It is not necessary to quote authorities in defining what is meant by the word 'salary' other than to point out that it is limited to compensation established on an annual or periodical basis and paid usually in installments, at stated intervals, upon the stipulated per annum compensation. It differs from the payment of a wage in that in the usual case wages are established upon the basis of employment for a shorter term, usually by the day or week, or on the so-called 'piece work' basis, and are more frequently subject to deductions for loss of time."

Under this definition the payment which Mr. Mason would receive as secretary of the said joint special committee, as described in your communication, would be a salary. It would not be compensation on a per diem basis paid for the limited time in which he was engaged on the special work of said committee. There can be no doubt but that the sum of $3,000 which Mr. Mason receives as clerk of the Senate Committee on Rules and assistant to the President of the Senate is a salary.

The facts as you have set them forth in your communication and as you have advised me regarding them do not appear to bring this matter within the principles relative to overtime work, as set forth in V Op. Atty. Gen. 697 and 699. See also II Op. Atty. Gen. 309.

Accordingly, I am constrained to advise you that the proposed payment to Mr. Mason for work for the said joint special committee, in the form in which it is now presented, should not, as a matter of law, be approved by your Committee.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Teachers' Retirement Law — Assessments — Failure to deduct Assessments seasonably.

Teachers must pay back assessments and interest thereon before being granted a retiring allowance.

JULY 2, 1929.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion as to four questions, which are listed below: —

"1. If the assessments required by section 9 (2) of the retirement law (G. L., c. 32) are not deducted from the salary of a teacher who is subject to the law, is it necessary that the omitted assessments be paid by the teacher if the teacher is in the service of the public schools of Massachusetts, serving either in the city or town where the deductions were not made or in some other city or town?

2. If it is necessary that a teacher pay assessments in error omitted, is it also necessary that the teacher pay the interest which would have been credited on the omitted assessments, so that the teacher will have to his credit in the retirement fund the same amount which he would have had if the assessments had been paid in the regular manner as provided by section 12 (5); or, if the payment of interest is not required, is the payment of interest permissible?

3. If it is necessary that a teacher pay assessments in error omitted, either with or without the interest on said assessments, can the teacher be granted a retiring allowance before the amount due the retirement fund has been paid in full?

4. Is the following rule adopted by the Retirement Board at a meeting held September 29, 1925, in accordance with the provisions of the retirement law:

'If a school committee shall neglect to deduct from the salary of a teacher the assessments required by law, the amount due the annuity fund shall be paid in one sum by the teacher, or in equal monthly installments over a period of not exceeding five years, provided that the monthly installments shall not be less than the regular monthly assessment and they shall be deducted from the salary of the member by the employing school committee as directed by the Retirement Board.'"

1. In my opinion, a teacher who is subject to the law must pay into the retirement fund all payments required by law which have not been deducted by the proper authorities. G. L., c. 32, § 7, defines who are members of the Teachers' Retirement Association, and makes membership in certain cases mandatory. Your question assumes that the teacher under consideration is subject to the law, and the teacher must therefore become a member of this Association. Section 9 of said chapter 32 requires that each member shall pay into the annuity fund certain assessments, which are to be deducted from his salary. Section 12 (5) of said chapter 32 provides that the school committee of each town shall, as directed by the Board, deduct from the amount of the salary due each teacher employed in the public schools of such town such amounts as are due as contributions to the annuity fund, as prescribed in section 9.

I am informed that in certain cases deductions have not been made and that several teachers who, under the law, are required to be members of the Association have not paid, either by deduction or otherwise, any sums into the annuity fund. In view of the fact that both membership and payments are mandatory under the statute, I am of the opinion that it is necessary that such teachers pay into the fund an amount equal to that which they would have paid had the deductions been properly made.

2. I am of the opinion that such a teacher must pay the interest which would have been credited on the unpaid assessments, so that he will have to his credit in the fund the same amount which he would have had if he had regularly paid the assessments as provided by law. It is to be noted that section 7 (3) of said chapter 32, as amended by St. 1927, c. 173, provides that in certain cases a teacher may become a member of the Association by paying an amount equal to the total assessments, together with regular interest thereon, which he would have paid if he had joined on September 30, 1914. This section is dealing with the case of a teacher who, as far as unpaid assessments are concerned, is in exactly the same position as the teacher about whom you inquire in your second question; and if the law requires that a teacher described in said section 7 (3) must pay regular interest, it would seem to follow logically that a teacher of the type about whom you inquire should also pay that interest. Further, it is only equitable that a teacher who has during the past years had the use of the money should pay a fair rate of interest upon it, so that he will be in approximately the same position as the teacher who has complied with the law and from whose salary installments have been deducted.

3. In my opinion, a teacher may not be granted a retiring allowance before the amount due the retirement fund has been paid in full. The law contemplates that only teachers who have complied with the law

relative to the payment of installments shall receive the retiring allowance. Section 7 (3) of said chapter 32, as amended, provides that certain teachers who are not compelled to become members of the Association may become such members if they so wish. With reference to the payment by such teachers of back installments, the paragraph provides that the teacher shall become a member of the Association when the total amount due on account of back assessments and interest has been accumulated in the annuity fund. Such a person is not enrolled as a member until the entire amount of back assessments is paid. Logically, the situation would seem to be similar in the case of a teacher who is compelled to become a member of the Association with reference to the right to receive the benefits thereof. There is no statute covering the exact point at issue, and the law most nearly applicable is that above cited. The whole theory and purpose of the law, as indicated throughout, is to confer its benefits upon teachers only when they have completely complied with its provisions, and if a teacher has not paid the full amount due at a given time it does not seem consistent with the purpose of the law that he should be permitted to receive its benefits. The mere fact that a school board or committee has failed to deduct from a teacher's salary the amounts due from time to time, as required by law, does not in any way alter the situation. The amounts are due regardless of whether or not the school board performs the mechanical details of deducting them.

4. In my opinion, the rule adopted on September 29, 1925, is within the power of the Board. Section 8 (2) of said chapter 32 provides that "the board may make by-laws and regulations consistent with law." In my opinion, it is well within the scope of the power of the Board to enact the rule referred to, although as to its desirability I, of course, make no comment.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Fraternal Organizations — Certificates.

A final certificate may not be granted to a fraternal organization, under G. L., c. 176, which has already made contracts for the payment of death or disability benefits or has made such contracts or payments for death before the provisions of G. L., c. 176, § 8, have been complied with.

JULY 3, 1929.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have sent me a letter which, in part, is as follows: —

"G. L., c. 176, §§ 6–9, inclusive, regulate the formation and authorization of domestic fraternal benefit societies. Section 8 provides, in part, that no such society shall incur any liability except for advance payments made by applicants for membership, nor pay or allow any death or disability benefits until it has performed certain acts, and that upon the presentation of satisfactory evidence that the society has complied with all the provisions of said chapter, the Commissioner shall issue to the society a certificate to that effect.

A certain society in the process of formation has received a preliminary certificate under said section 8 but has not received the final certificate required under said section. It has complied with all the requirements of section 8 but it or its incorporators have in fact made contracts for the

payment of death or disability benefits or have paid such benefits contrary to the foregoing prohibition of said section. It now applies for a final certificate."

You request my opinion upon the two following questions relative to the matters which you have set forth: —

"1. Is the Commissioner precluded as a matter of law from granting a final certificate to a society, under said section 8, which has fulfilled all the requirements of said section 8 but which has admittedly made contracts for the payment of, or has paid, death or disability benefits contrary to said section, on the ground that the society has not complied with all the provisions of said chapter 176?

2. If you answer the preceding question in the negative, is the society as a matter of right entitled, on the facts set forth in the preceding question, to receive a final certificate in such circumstances, or is the issue thereof discretionary with the Commissioner?"

I answer your first question in the affirmative.

G. L., c. 176, § 8, provides, with relation to an unincorporated fraternal benefit society, the incorporators of which have held their first meeting, that —

"The commissioner shall then furnish the incorporators of any such society, if on the lodge plan, with a preliminary license, authorizing it to solicit members for the purpose of completing its organization. It shall collect from each applicant the amount of not more than one periodical benefit assessment or payment, in accordance with its tables of rates as provided by its constitution and by-laws, and shall issue to every such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advance payments, nor issue any benefit certificate, nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death or disability benefit certificates, as the case may be, have been secured from at least five hundred persons, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of the society; nor until there shall be established ten subordinate lodges or branches, in which said five hundred applicants have been initiated; nor until there has been submitted to the commissioner, on oath of the president and secretary or corresponding officers of such society, a list of the said applicants, giving their names, addresses, date of examination, date of approval, date of initiation, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, and rate of regular payments or assessments, which for societies offering death benefits shall not be lower for death benefits than those required by the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress August twenty-third, eighteen hundred and ninety-nine, or any higher standard at the option of the society, with an interest assumption not higher than four per cent per annum; nor until it shall be shown to the commissioner, by the sworn statement of the treasurer or corresponding officer of such society, that at least five hundred applicants for death benefits have each paid in cash one regular payment or assessment as herein provided, and the payments in the aggregate shall amount to at

least twenty-five hundred dollars, all of which shall be credited to the mortuary or disability fund on account of the applicants, and no part of which may be used for expenses. Such advance payments shall, during the period of organization, be held in trust for the applicants, and if the organization is not completed within one year as hereinafter provided, shall be returned to them. The commissioner may make such examination and require such further information as he deems advisable; and upon presentation of satisfactory evidence that the society has complied with all the provisions of this chapter, he shall issue to the society a certificate to that effect."

In addition to the information contained in your letter, you have advised me that the incorporators of the society as to which your inquiries are particularly addressed have both made promises to pay death and disability benefits and have paid such benefits before actual bona fide applications for certificates had been secured from at least five hundred persons, and have actually in fact paid death benefits before the medical examinations required by the said statute had been made and certificates thereof filed.

If the explicit provisions of said section 8 have been violated in the ways above described, it cannot be said that the society has complied with all the provisions of chapter 176, and, accordingly, satisfactory evidence of compliance with the provisions of said chapter, upon which the issuance of the certificate mentioned in said section 8 is predicated, cannot be before the Commissioner so as to require him to issue such certificate.

Moreover, payment of benefits before receipt of the Commissioner's certificate, which can from the nature of the case be made only from "advance payments," as those words are used in said section 8, has prevented the society from a compliance with that provision of section 8 which requires that advance payments "shall, during the period of organization, be held in trust for the applicants," to be returned if the organization is not completed.

My answer to your first inquiry precludes the necessity of answering your second question.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Public Welfare — Minor Children — Settlements.

After a divorce, when the children of a marriage have a settlement within the Commonwealth, derived from their mother, they will not lose it if the father has no settlement in the Commonwealth.

JULY 11, 1929.

Hon. RICHARD K. CONANT, *Commissioner of Public Welfare.*

DEAR SIR: — You have asked my opinion in a communication which reads as follows: —

"I respectfully request your opinion whether or not three minor children, who now live in Athol, have a legal settlement within the Commonwealth. The father of the children was granted a decree of divorce which becomes absolute on July 21, 1929, and the court awarded the custody of the three children to him. He was born in Wisconsin May 8, 1894, and has never resided in any town in Massachusetts long enough to gain a legal settle-

ment. The mother of the three children was born in Erving, Massachusetts, February 4, 1902, and she admittedly has a legal settlement in that town."

I assume that your question relates to the settlement as of the time, July 21st, when the decree of divorce becomes absolute. G. L., c. 116, § 1, cl. Third, reads: —

"Legitimate children shall follow and have the settlement of their father if he has one within the commonwealth, otherwise they shall follow and have the settlement of their mother if she has one; if the father dies during the minority of his children they shall thereafter follow and have the settlement of the mother. Upon the divorce of the parents the minor children shall follow and have the settlement of the parent to whom the court awards their custody."

The provision in the above-quoted section in regard to divorce was added by St. 1911, c. 669. Under R. L., c. 80, § 1, cl. Second, which contained only what is now the first part of the section of the General Laws above quoted, the children in the case in question would clearly, because of the divorce, not lose their settlement in the town of Erving. In my opinion, the terms used in the provision added by the act of 1911 cannot properly be construed as changing the result. The word "settlement" must mean settlement within this Commonwealth; and since in the case in question the father, to whom custody is given, has no settlement within the Commonwealth, the provision has, by its terms, no application. The provision does not purport in terms to change the law in a case where the parent to whom custody is given does not have a settlement, and, in my opinion, no such meaning can be read into it.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Physician — Certificate of Registration — Town.

A physician must present his certificate of registration to the city or town clerk of each city or town in which he establishes an office.

JULY 16, 1929.

Mr. WILLIAM F. CRAIG, *Director of Registration.*

DEAR SIR: — You request my opinion as to whether it is necessary, under G. L., c. 112, § 8, for a physician to record his certificate of registration with the city or town clerk "each time he establishes a new business address."

Said section 8 provides, in part: —

"No person shall enter upon, or continue in, the practice of medicine within the commonwealth until he has presented to the clerk of the town where he has, or intends to have, an office or his usual place of business, his certificate of registration as a physician in the commonwealth."

I assume that your question refers to a case where a physician, who has recorded his certificate in one town, moves to or opens an office in another town. There seems to be nothing in the statute to require a new record where the physician takes a new business address within the same town. The statute, in my opinion, requires the certificate to be recorded in each town in which the physician establishes an office.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Life Policies — Incontestability — Forms.

A clause eliminating hazards of aviation from the coverage of a life policy may not be disapproved upon that ground alone.

Aug. 8, 1929.

Hon. Merton L. Brown, *Commissioner of Insurance.*

Dear Sir: — You have asked my opinion, in the first portion of a written communication, upon several questions relative to the interpretation and application of the incontestability provision concerning policies of life insurance embodied in G. L., c. 175, § 132, cl. 2. You have directed my attention particularly to certain forms of riders or endorsements intended to be attached to life policies, as to which your approval has been requested and which are before you for consideration.

The first two questions which you have propounded in relation to this portion of your communication are not limited in their scope to the forms of riders as to which you are now required to act, but are general in their nature and deal with possible and hypothetical states of fact which may or may not be called to your attention in the future and which are not necessarily governed by precisely the same principles of law as are applicable to the specific problems which arise upon the matters now actually before you for determination. I therefore do not at the present time deem it incumbent upon me to answer your questions numbered I, 1 and 2.

I.

You advise me in your communication as follows: —

"I. Certain life insurance companies have filed with me, and have requested me to approve, under said section 132 and section 192 of said chapter 175, certain forms of riders or endorsements which they propose to attach to forms of life or endowment policies to be issued in this Commonwealth, said policy forms having been duly approved by the Commissioner under said section 132 and containing the provision required by clause 2 of said section 132.

These forms of riders or endorsements read as follows: —

'(1) Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this contract; but, if the Insured shall die as a result, directly or indirectly, of such service, travel or flight, the Company will pay to the beneficiary the reserve on this contract.

(2) Death or disability resulting directly or indirectly from being in, on or about or operating or handling any vehicle or mechanical device for aerial navigation or in falling therefrom or therewith is a loss not assumed under any of the terms of this Policy; but in the event of such death the Company will pay to the beneficiary the amount of the reserve on this Policy.

(3) In the event of the death of the Insured within a period of ten years from the date of issue of this policy resulting directly or indirectly from travel, service or flight in any species of aircraft, the Company's liability under this contract shall be limited to the reserve guaranteed by the policy.' "

With relation to the foregoing you have asked me the following questions: —

"3. May the Commissioner, under G. L., c. 175, §§ 132 and 192, as amended, lawfully approve any form of policy of life or endowment insurance, except an industrial policy, containing in substance the provisions required by clause 2 of said section 132 and the provisions of the forms of riders or endorsements set forth in I, *supra*, and numbered (1) and (2), or the form of the said riders or endorsements for attachment to the aforesaid forms of policies?

4. May the Commissioner, as aforesaid, lawfully approve any such form of policy containing in substance the provisions required by said clause 2 and the provisions of the form of rider or endorsement set forth in I, *supra*, and numbered (3), or the form of the said rider or endorsement for attachment to the aforesaid forms of policies?"

I am also advised that one of your predecessors in office has at some time in the past approved riders similar to one of the three forms described in your letter, so that there would not appear to be an established departmental interpretation of the incontestable clause of G. L., c. 175, § 132, cl. 2, adverse to the approval of such riders.

G. L., c. 175, § 132, cl. 2, as amended, reads as follows: —

"A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue except for non-payment of premiums or violation of the conditions of the policy relating to military or naval service in time of war and except, if the company so elects, for the purpose of contesting claims for total and permanent disability benefits or additional benefits specifically granted in case of death by accident."

G. L., c. 175, § 192, as amended, in its pertinent parts is as follows: —

"All provisions of law relative to the filing of policy forms with, and the approval of such forms by, the commissioner shall also apply to all forms of riders, endorsements and applications designed to be attached to such policy forms and when so attached to constitute a part of the contract."

The incontestability of the policy as provided for in said section 132, clause 2, precludes a defense that the contract made between the parties is not valid and binding. It does not preclude a defense that the subject matter of a claim is outside the scope of the contract as written. It does not enlarge the coverage of the contract, neither does it of itself determine the risk or hazard which the parties to the contract elect to include therein.

The policy with its rider or endorsement constitutes the contract of insurance made between the parties, and where the risk of aviation hazards is limited in, or eliminated from, such contract the fact that the contract as made is incontestable in no way tends to make illegal the terms of the agreement as written by the mutual consent of the parties in the policy and endorsement.

It cannot fairly be said that because the statute sets forth certain exceptions to incontestability of a policy no contract may be made which by the mutual agreement of insured and insurer lessens the extent of the coverage by removing those connected with aviation from the scope of coverage.

The riders or endorsements with relation to aviation, set forth above as (1), (2) and (3), do not appear to be contrary to any provisions of law, and I answer your questions 1, 3 and 4, in the affirmative.

II.

You have advised me in your communication as follows: —

"II. Certain life insurance companies are issuing in this Commonwealth a form of industrial life policy which contains a provision that the policy —

'shall be incontestable after it has been in force during the lifetime of the Insured, for a period of two years from the date of issue, except for nonpayment of premiums, fraud or misstatement of age';

and further provisions which read as follows: —

'If, (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the "Space for Endorsements" on page 4 in a waiver signed by the Secretary; or if (3) any Policy on the life of the Insured hereunder has been previously issued by this Company and is in force at the date hereof, unless the number of such prior Policy has been endorsed by the Company in the "Space for Endorsements" on page 4 hereof (it being expressly agreed that the Company shall not, in the absence of such endorsement, be assumed or held to know or to have known of the existence of such prior Policy, and that the issuance of this Policy shall not be deemed a waiver of such last mentioned condition), then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud, in which case all premiums will be forfeited to the Company.'"

In relation thereto you have asked me this question: —

"5. May the Commissioner, under said section 132, as amended, lawfully approve a form of industrial life policy containing the provision for incontestability and the other provisions set forth in II, *supra*, or should such a form of policy be disapproved, as a matter of law, on the ground that any condition, a violation of which, existing prior to the expiration of the period of time specified in said provision for incontestability and continuing or occurring, thereafter, relieves the company from liability, is repugnant to the provision for incontestability?"

G. L., c. 175, § 132, does not require the insertion of a clause as to incontestability in a policy of industrial insurance.

An incontestable clause is a part of the industrial life policy under consideration, but various provisions are introduced into the contract by which the insurer may avoid liability. In each instance the exceptions to the incontestability of the contract, introduced into the policy, relate to facts, circumstances or events prior to, and in some instances leading up to, the making of the contract. Such exceptions would be plainly repugnant to a statutory requirement that such policies should contain an incontestable clause, such as is required for the life policies, which have previously been considered. In this instance, however, the incontestable

clause, modified by the exceptions, constitutes, when read in connection with each other, a term of the policy fixed by agreement of the insured and insurer which is not contrary to any provision of law governing the form of industrial policies.

I therefore answer your fifth question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

State Hospital — Gardner State Colony — Superintendent — Inmates.

A superintendent of a State hospital or colony has authority to allow patients to leave the grounds, under proper supervision, for short periods, under conditions beneficial to their health.

SEPT. 7, 1929.

Dr. GEORGE M. KLINE, *Commissioner of Mental Diseases.*

DEAR SIR: — You have asked my opinion relative to the authority and liability of the superintendent of the Gardner State Colony in a communication as follows: —

"Your opinion is respectfully requested on certain questions raised by Dr. Charles E. Thompson, Superintendent of the Gardner State Colony.

He states that a short while ago after sending a number of patients to attend a circus at Fitchburg he became concerned as to possible legal liability should injuries occur to them. Inasmuch as this procedure is one that might arise in any institution, the Department feels that the subject is of sufficient importance to ask for an opinion on certain specific questions.

(1) Has the superintendent authority legally to allow a group of patients to leave the confines of an institution temporarily for recreation, entertainment or similar purpose?

(2) What liability, if any, attends a superintendent or other official in authority sending a patient or group of patients temporarily away from the confines of an institution for recreation, entertainment or similar purpose should injury occur to them, or should such patients injure persons or property?

(3) Is the State liable legally in such a case?"

1. I answer your first question in the affirmative. The Gardner State Colony is an institution under the control of your Department, listed under G. L., c. 123, as a State hospital to which insane persons may be committed. The authority to act, in the exercise of a wise discretion, for the benefit of such insane persons, vested in the Department and in its superintendents of State hospitals, is necessarily very broad. I cannot say, as a matter of law, that such a superintendent is not acting within his implied authority in allowing a group of patients, whose condition is such that they may reasonably be expected to receive benefit therefrom, to leave the confines of a State hospital for a short period of recreation or entertainment, when properly supervised and guarded. Of course, in any given instance the facts connected with each individual patient's well-being and safety must be considered by a superintendent.

2. Your second question asks for a somewhat general statement of law without reference to any specific facts. Speaking broadly, an official in charge of patients of a State hospital may be liable individually for acts

of negligence on his part which are the direct cause of injury to such patients or to the person or property of others. In taking action in relation to the care of his patients such official is bound to exercise such reasonable care as may properly be expected of a person occupying such a position of responsibility, having regard especially to the mental characteristics of those under his care.

3. The Commonwealth cannot be sued in its own courts for injuries or damages sustained by persons through the negligence of officials such as you describe in your letter. Claims with relation to such injuries or damages might, under certain circumstances, which it is not necessary for me to attempt to describe in detail, require the disbursement of money by the Commonwealth.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Citizenship — Registration of Voters.

The burden of proving citizenship is upon a person applying for registration as a voter.

The registrars of voters are to determine the question of citizenship upon such proof.

SEPT. 23, 1929.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You ask my opinion on the following question: —

"Have registrars of voters or election commissioners authority to register as a voter in this Commonwealth a person whose only right to citizenship is derived through naturalization of husband or father, upon presentation of certificate of naturalization of such husband or father, or must such person present a certificate obtained after application of said section 33 (45 Stat. at L., pt. I, p. 1512)?"

You state in your communication that —

"In the case of a wife, or a child who was a minor at the time of naturalization of his parent, and who is otherwise qualified to register, it is the present practice, I believe, of registrars of voters and election commissioners to require the production for inspection of the papers of the husband or parent. Such papers in late years bear the names of wife and minor children"; and that "the new form to be used for certificate of naturalization does not contain any blank for statement of wife or minor children, and election officials are apprehensive and in disagreement concerning proof of citizenship to be required."

The laws of the United States conferring citizenship upon minor children of naturalized parents are found in the United States Code, Title 8, chapter 1, sections 7 and 8, as follows: —

"SECTION 7. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and

jurisdiction of the United States, be considered as citizens thereof. (R. S. § 2172.)

SECTION 8. A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent, where such naturalization or resumption takes place during the minority of such child. The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States. (Mar. 2, 1907, c. 2534, § 5, 34 Stat. 1229.)"

In passing upon these statutes the Circuit Court of Appeals, Second Circuit, in *United States ex rel. Patton* v. *Tod*, 297 Fed. 385, said: —

"We have a simple system under which each statute confers rights in two different situations. Under R. S. U. S. § 2172 (U. S. C., Title 8, c. 1, § 7, above quoted), a foreign-born minor child dwelling in the United States at the time of the naturalization of the parent automatically becomes an American citizen. Under section 5 of the Act of March 2, 1907 (U. S. C., Title 8, c. 1, § 8, above quoted), a foreign-born child, not in the United States when the parent is naturalized, becomes a citizen only from such time as, while still a minor, it begins to reside permanently in the United States."

A person claiming to be a citizen by virtue of the naturalization of his parent can establish that fact, it seems to me, by producing substantial proof of his minority at the time of naturalization of the parent and that he was either dwelling in this country at that time or that he began to reside permanently in the United States during his minority.

The law relative to citizenship of a wife of a naturalized person, prior to Act of Congress approved September 22, 1922, provided (Rev. Stat. 1874, § 1994): —

"Any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized, shall be deemed a citizen."

A similar act has been construed in *Kelly* v. *Owen*, 7 Wall. 496, 498, to confer —

"The privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married,' or 'who shall be married,' do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that, whenever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after marriage, she becomes, by that fact, a citizen also."

Rev. Stat. 1874, § 1994, was repealed by Act of Congress approved September 22, 1922. The repealing statute expressly provides that citizenship acquired thereunder "shall not terminate." See U. S. C., Title 8, c. 9, § 368.

G. L., c. 51, § 44, provides, in part: —

"The registrars shall examine on oath an applicant for registration relative to his qualifications as a voter."

This statute places the burden of proving citizenship upon the person

applying for registration. It does not prescribe the manner in which the proof shall be established. The sufficiency of such proof is to be determined by the registrars in each individual case.

The prevailing practice of the registrars, in cases where applicants for registration claim citizenship by virtue of the naturalization of a parent or husband, of requiring the production by the applicant of the naturalization certificate of the parent or husband, is one way in which the question of citizenship of the applicant may be determined.

Another way in which the question may be determined is by the production by the applicant of a "certificate of citizenship" issued by the Commissioner of Naturalization under section 9 of the Act of March 2, 1929 (45 Stat. at L., pt. I, p. 1512), which section provides as follows: —

"Any individual over twenty-one years of age who claims to have derived United States citizenship through the naturalization of a parent, or a husband, may, upon the payment of a fee of $10, make application to the Commissioner of Naturalization, accompanied by two photographs of the applicant, for a certificate of citizenship. Upon obtaining a certificate from the Secretary of Labor showing the date, place, and manner of arrival in the United States, upon proof to the satisfaction of the commissioner that the applicant is a citizen and that the alleged citizenship was derived as claimed, and upon taking and subscribing to, before a designated representative of the Bureau of Naturalization within the United States, the oath of allegiance required by the naturalization laws of a petitioner for citizenship, such individual shall be furnished a certificate of citizenship by the commissioner, but only if such individual is at the time within the United States. In all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States, the certificate of citizenship issued under this section shall have the same effect as a certificate of citizenship issued by a court having naturalization jurisdiction."

An examination of the legislative history of the Act of March 2, 1929 (45 Stat. at L., pt. I, p. 1512), leads me to believe that Congress did not intend that all persons claiming citizenship through the naturalization of a parent or husband should be required to secure a "certificate of citizenship" to entitle them to the privileges of native born or naturalized Americans. I believe that until and unless the Legislature of the Commonwealth, by legislative act, requires the production of a "certificate of citizenship" issued under said Act of March 2, 1929, to establish citizenship for the purposes of registration as voters, the registrars of voters or election commissioners cannot require an applicant for registration to procure such a "certificate of citizenship" if the citizenship of such applicant can be proved in any other manner. I am therefore of the opinion that registrars of voters or election commissioners have authority to register as a voter in this Commonwealth a person whose only right to citizenship is derived from naturalization of husband or parent, upon presentation of a certificate of the naturalization of such husband or parent, if they are satisfied that citizenship was derived in that manner; and if, in their judgment, the proof offered is not sufficient, they may require a "certificate of citizenship," but they cannot arbitrarily require the production of such certificate in all cases.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Fire Marshal — Rules — Enforcement.

It is the duty of both the State Fire Marshal and the local authorities to prosecute violations of regulations made under G. L., c. 148.

Oct. 3, 1929.

Gen. Alfred F. Foote, *Commissioner of Public Safety.*

Dear Sir: — You state that certain persons in the city of Lynn are violating the regulations of the State Fire Marshal relative to the use of inflammable fluids and compounds in the manufacture of shoes, that the Marshal has delegated to the head of the fire department of said city "the carrying out of any lawful rule, order or regulation established by the Fire Marshal," that the city officials have taken the position that it is not their duty but the duty of the Fire Marshal to enforce the regulations, and that accordingly they are not prosecuting said violations. You request my opinion as to "whether it is the duty of the State Fire Marshal to execute and enforce" these regulations, "or whether it is incumbent upon the Lynn authorities to execute and enforce these regulations under the authority vested in them by the aforesaid delegation of power."

The regulations in question are made under authority of G. L., c. 148, § 30, which authorizes the Marshal, among other things, to inspect or regulate the keeping or use of inflammable fluids and compounds. Section 31 of said chapter provides: —

"The marshal may delegate the granting and issuing of any licenses or permits authorized by sections thirty to fifty-one, inclusive, or the carrying out of any lawful rule, order or regulation of the department, or any inspection required under said sections, to the head of the fire department or to any other designated officer in any city or town in the metropolitan district."

Acting under said section 31 the Marshal has delegated to the head of the fire department of the city of Lynn —

"The right to issue any permit authorized by G. L., c. 148, §§ 30–51, inclusive, the carrying out of any lawful rule, order or regulation established by the Fire Marshal, and the right to make any inspection required under said sections."

Section 51 of said chapter 148 imposes the penalty of a fine for violation of rules made under section 30.

The regulations in question "have the force and effect of law." *Guinan* v. *Famous Players-Lasky Corporation*, Mass. Adv. Sh. (1929) 1297, 1305.

In my opinion, it is the duty of *both* the State Fire Marshal and the local authorities to see to it that these violations of law are prosecuted. If it appears to the Marshal that the local authorities are failing to prosecute violations of law, it is his duty as a public official to cause such violations to be prosecuted. The fact that the Marshal has delegated the carrying out of these regulations to local authorities does not deprive him of the power or free him from the duty of acting in cases where it becomes known to him that the local authorities are failing to act.

Very truly yours,

Joseph E. Warner, *Attorney General.*

Fire Marshal — Municipalities — Ordinances — Fire Prevention.

Cities and towns have no power to make ordinances regulating storage and use of explosives and inflammable fluids within the Metropolitan Fire Prevention District, but may regulate by ordinances for fire prevention in connection with the construction of buildings.

Oct. 8, 1929.

Special Commission for Investigation of the Laws, Rules and Regulations relating to Fire Prevention.

Gentlemen: — You request my opinion upon the following questions: —

"1. Have municipalities within the Metropolitan Fire Prevention District authority to adopt ordinances, in addition to the rules of the State Fire Marshal and the Department of Public Safety, relating to fires and to fire prevention?

2. Have municipalities outside the Metropolitan Fire Prevention District authority to adopt ordinances, in addition to the rules of the State Fire Marshal and the Department of Public Safety, relating to fires and to fire prevention?"

Under G. L., c. 143, § 3, every city, except Boston, and every town accepting the statute is authorized, "for the prevention of fire," among other things, to regulate by ordinance or by-law "the inspection, materials, construction, alteration, repair, height, area, location and use of buildings and other structures."

By G. L., c. 148, § 39, the Fire Marshal is given certain limited powers to make rules within the metropolitan district "relating to fires, fire protection and fire hazard." By section 42 the Fire Marshal may require reports from heads of fire departments of violations "of ordinances, by-laws, rules or orders made by the various cities and towns, or by the Marshal, relating to fires, fire hazard and fire protection." The statute first cited, giving to cities and towns power to regulate as therein stated, is in full force and effect. It has not been abrogated by any delegation of authority to regulate given to the State Fire Marshal or to the Department of Public Safety, either within or without the metropolitan district. See *Storer* v. *Downey*, 215 Mass. 273; *Kilgour* v. *Gratto*, 224 Mass. 78.

As to any ordinances or by-laws relating to the storage or use of explosives or inflammable compounds, assuming that such ordinances or by-laws cannot be brought within the scope of G. L., c. 143, § 3, above referred to, a different question is presented. Under the Revised Laws cities and towns, in addition to the power given them to regulate, for the prevention of fire, the inspection, materials, construction, alteration and use of buildings and other structures (R. L., c. 104, § 1, now G. L., c. 143, § 3), were authorized to adopt ordinances, by-laws and regulations relative to the storage and sale of camphine or any similar explosive or inflammable fluid (R. L., c. 102, § 94), and also to make certain orders relative to storage of gunpowder and use of certain explosives (R. L., c. 102, §§ 89 and 91).

But by St. 1904, c. 370, § 1, it was provided that —

"The powers conferred on city councils of cities and selectmen of towns by chapter one hundred and two of the Revised Laws, to regulate the keeping, storage, use, manufacture or sale of gunpowder, dynamite or

other explosives and inflammable fluids, shall hereafter be exercised by the fire marshal's department of the district police."

By section 5 it was provided that —

"So much of chapter one hundred and two of the Revised Laws as is inconsistent herewith is hereby repealed."

By St. 1914, c. 795, which created the office of Fire Prevention Commissioner for the Metropolitan District, it was provided in section 3 that —

"All existing powers, in whatever officers, councils, bodies, boards or persons, other than the general court and the judicial courts of the commonwealth, they may be vested, to license persons or premises, or to grant permits for or to inspect or regulate or restrain the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitroglycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, and the use of engines and furnaces described in section seventy-three of chapter one hundred and two of the Revised Laws, are hereby transferred to and vested in the commissioner."

The power of the Department of Public Safety, as now constituted, to make rules, applicable outside of the metropolitan district, governing the storage or use of explosives or inflammable fluids or compounds is found in G. L., c. 148, § 10, which reads as follows: —

"The department may make rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, and may prescribe the materials and construction of buildings to be used for any of the said purposes, except that cities and towns may by ordinances or by-laws prohibit the sale or use of fireworks or firecrackers within the city or town, or may limit the time within which firecrackers and torpedoes may be used."

The power of the Marshal to make rules governing the storage or use of explosives or inflammable fluids and compounds within the metropolitan district is found in G. L., c. 148, § 30, in the following words: —

"The marshal shall have within the metropolitan district the powers given by sections ten, thirteen, fourteen, twenty, twenty-one and twenty-two to license persons or premises, or to grant permits for, or to inspect or regulate, the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitroglycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, firecrackers, or any other explosives, and the use of engines and furnaces as described in section one hundred and fifteen of chapter one hundred and forty; provided, that the city council of a city or the selectmen of a town may disapprove the granting of such a license or permit, and upon such disapproval the permit or license shall be refused. In Boston certificates of renewal of licenses as

provided in section fourteen shall be filed annually for registration with the fire commissioner, accompanied by a fee of one dollar."

In my opinion, the terms of these statutes must be construed as divesting cities and towns of any power which they previously had to regulate the storage and use of explosives or inflammable fluids as such. Such powers to make rules and regulations became vested in the Fire Marshal's department of the District Police, or afterwards, within the metropolitan district, in the Fire Prevention Commissioner; and to these powers the Department of Public Safety (or the State Fire Marshal) has succeeded. Gen. St. 1919, c. 350, § 99.

As before stated, however, cities and towns may still, under G. L., c. 143, § 3, by ordinances or by-laws regulate, for the prevention of fire, the construction and use of buildings and other structures. (It will also be noted that under G. L., c. 148, § 30, the power of the Fire Marshal to *license* within the metropolitan district is subject to the approval of the local authorities.)

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles — Length — Ways.

Motor vehicles and trailers when used for transportation of poles, and various single units having an over-all length, inclusive of load, of not more than 60 feet, may operate on any public way.

OCT. 14, 1929.

Hon. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion concerning the interpretation of G. L., c. 90, § 19, as amended, with relation to two questions which you have set forth as follows: —

"(1) If the Department should decide to designate localities or ways, as provided in this act, will it be possible to limit any such way to a 33-foot vehicle, or will the act of designation automatically carry with it authority for the use of such ways by vehicles which, when loaded with poles, have an over-all length of 60 feet?

(2) If no designation is made by the Department under the provisions of this act, can motor vehicles loaded with poles, having an over-all length of 60 feet, be legally operated on any way without the 'special permit' mentioned in the tenth line of this act?"

G. L., c. 90, § 19, as amended by St. 1929, c. 313, reads: —

"No motor vehicle or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which is more than twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way or, in case of a state highway or a way determined by the department of public works to be a through route, from said department; provided, that such width may be exceeded by the lateral projection of pneumatic tires beyond the rims of the wheels for such distance on either side of the vehicle or trailer as will not increase its outside width above one hundred and two inches; and provided, further, that the extreme over-all length of such a vehicle or trailer when used in localities or on ways designated by the said department may exceed twenty-eight feet but not thirty-three feet, and

that, when used for the transportation of poles or single units of lumber or metal, such length may exceed twenty-eight feet but not sixty feet, except as authorized by a special permit granted as aforesaid. The aforesaid dimensions of width and length shall be inclusive of the load."

Before the enactment of the amending act, St. 1929, c. 313, G. L., c. 90, § 19, as then amended by St. 1927, c. 72, was as follows: —

"No commercial motor vehicle, motor truck or trailer, the outside width of which is more than ninety-six inches or the extreme over-all length of which exceeds twenty-eight feet, shall be operated on any way without a special permit so to operate from the board or officer having charge of such way, or, in case of a state highway or a way determined by the department of public works to be a through route, from the commissioner of public works. The aforesaid dimensions of width and length shall be inclusive of the load."

Accordingly, the law as it stood before the passage of St. 1929, c. 313, prohibited the operation on any way of a commercial motor vehicle or trailer having an over-all length, inclusive of its load, of more than 28 feet, without a special permit.

The amendment of section 19 by St. 1929, c. 313, in its first clause establishes precisely the same general prohibition as to over-all length of all motor vehicles and trailers as had been set forth for commercial motor vehicles and trailers immediately prior thereto, and then sets up certain exceptions to the general prohibition of an over-all length, inclusive of load, in excess of 28 feet, and these exceptions are: First, as to such vehicles when used in localities or on ways designated by the Department of Public Works, in which instance the maximum length may be 33 feet; and second, as to such vehicles "when used for the transportation of poles or single units of lumber or metal," in which latter instance the maximum length may be 60 feet.

I am of the opinion that the second exception noted above, in favor of such vehicles as are used for the designated transportation purposes, is not limited to such vehicles so used when run upon designated ways or in designated localities, but applies to them wherever used upon the ways throughout the Commonwealth. I am constrained to think that such was the intent of the Legislature as expressed by the words of St. 1929, c. 313, by reason of the fact that the word "that" immediately follows the word "and," in the twenty-second line of said chapter, indicating, in connection with the context, a separation of the provisions which immediately follow it from those employed just before in relation to designated ways and localities. I am confirmed in this view by the further fact that the provisions of the exceptions concerning motor vehicles on "designated" ways state that their length "may exceed twenty-eight feet but not thirty-three feet," and that the language with relation to motor vehicles engaged in the designated transportation is that their length "may exceed twenty-eight feet but not sixty feet." If the exception with relation to the last-named class of vehicles had been intended by the Legislature to be limited by the provisions connected with use on designated ways, the wording used would not have been as above quoted but would naturally have been, — "may exceed thirty-three feet but not sixty feet."

In accordance with the foregoing considerations I answer your first question to the effect that, irrespective of a designation of localities or

ways by your Department, motor vehicles and trailers, "when used for the transportation of poles and single units of lumber or metal," having an over-all length, inclusive of load, of not more than 60 feet, may operate in any locality and upon any public way, designated or undesignated; and that you have no authority to limit the use of any public way whatsoever to 33-foot vehicles to the exclusion of those not over 60 feet, used in said transportation.

I answer your second question in the affirmative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Chief of Police of Leominster.

The chief of police of Leominster is within the civil service law and rules.

OCT. 23, 1929.

HON. ELLIOT H. GOODWIN, *Commissioner of Civil Service.*

DEAR SIR: — You have asked me the two following questions: —

"1. Did the passage of Gen. St. 1918, c. 291, § 22, legalize the act of the town of Leominster in accepting St. 1911, c. 468, and place the chief of police of that town within the civil service classification?

2. If the answer to question number one is in the affirmative, does the fact that Leominster became a city on January 3, 1916, prior to the passage of the 1918 amendment, affect the situation?"

You advise me that on March 3, 1915, the town of Leominster voted to accept the provisions of R. L., c. 19, § 37, and "at the same time," but I assume somewhat thereafter, the town voted to accept the provisions of St. 1911, c. 468, which in effect classified the chief of police of the town under the civil service.

An opinion of one of my predecessors in office, to which you refer in your communication and with which I agree, was given the Civil Service Commission under date of March 21, 1917 (not published), and was to the effect that the town of Leominster did not by its votes of March 3, 1915, so accept St. 1911, c. 468, as to place its chief of police within the classified service.

The reason for the result arrived at by the opinion was that the town, by its first vote of March 3, 1915, accepted only the provisions of R. L., c. 19, § 37, and not the whole of said chapter 19, and that since by the terms of St. 1911, c. 468, as it then read, the acceptance by a town of St. 1911, c. 468, was not effective unless it had previously accepted all the provisions of R. L., c. 19, the action of the town did not in the then existing state of the law constitute a valid acceptance of St. 1911, c. 468.

After the said opinion was rendered, the Legislature enacted in 1918 an amendment to said St. 1911, c. 468, namely, Gen. St. 1918, c. 291, § 22, which reads as follows: —

"Section one of chapter four hundred and sixty-eight of the acts of nineteen hundred and eleven is hereby amended by inserting after the word 'of' in the ninth line the words — section thirty-seven of, — and by inserting at the end thereof the words — as applied to the police force thereof, — so as to read as follows: — *Section 1.* The provisions of chapter nineteen of the Revised Laws, entitled 'Of the Civil Service', and all acts in amendment thereof and in addition thereto, and the civil service

rules made thereunder, and all acts now or hereafter in force relating to the appointment and removal of police officers, shall apply to the superintendent, chief of police or city marshal in all cities except Boston, and in all towns that have accepted, or may hereafter accept, the provisions of section thirty-seven of said chapter nineteen as applied to the police force thereof."

This statute made applicable to cities and towns which had accepted said section 37 only, all acts then or thereafter in force relative to chiefs of police upon acceptance of the statute of 1911. The town had previously voted to accept St. 1911, c. 468, but its vote was ineffectual as an acceptance only because said statute as it then stood required the acceptance of the whole of R. L., c. 19, as a prerequisite to the acceptance of St. 1911, c. 468. The town had in fact prior to its vote on the acceptance of the statute of 1911, voted to accept said section 37 of R. L., c. 19. The effect of the amendment of the statute of 1911 by Gen. St. 1918, c. 291, § 22, was to make effective the vote of the town accepting said statute of 1911, by reason of its acceptance of said section 37. In my opinion, the intent of the Legislature in amending St. 1911, c. 468, was to give to the amended section a retroactive effect to the extent above set forth.

You advise me that Leominster became a city January 3, 1916, that is, prior to the passage of Gen. St. 1918, c. 291, § 22. The fact that it was so incorporated prior to the enactment of Gen. St. 1918, c. 291, § 22, is immaterial. The city of Leominster is the same municipal corporation as the inhabitants of the town of Leominster were. By being incorporated as a city the identity of the municipal corporation is not lost (*Higginson* v. *Turner*, 171 Mass. 586, 591), and the acceptance of R. L., c. 19, § 37, and of St. 1911, c. 468, by the town in 1915 is an acceptance of said chapters by the city of Leominster, within the meaning thereof, in view of the effect of Gen. St. 1918, c. 291, already noted.

I answer your first question to the effect that the passage of Gen. St. 1918, c. 291, § 22, had the effect of making R. L., c. 19, and all acts in amendment thereof and in addition thereto, and the civil service rules made thereunder, and all acts in force at the effective date of said chapter 291 and thereafter enacted, relating to the appointment and removal of police officers, applicable to the chief of police of Leominster.

I answer your second question in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Incompatibility of Offices.

The positions of register of probate of Hampden County and special justice of the District Court at Holyoke may both be held by one person.

Nov. 4, 1929.

His Excellency FRANK G. ALLEN, *Governor of the Commonwealth.*

SIR: — You have requested my opinion upon the following question of law: —

"On October 30, 1929, the name of Russell L. Davenport, Esquire, of Holyoke, was submitted for the position of register of probate for the County of Hampden. For your information Mr. Davenport at the

present time is special justice of the District Court at Holyoke. If the Executive Council confirms the nomination of Mr. Davenport for the position of register of probate on November 6th, will it be constitutional for him to hold the two offices mentioned at the same time?"

Mass. Const., pt. 2nd, c. VI, art. II, and Mass. Const. Amend. VIII set forth certain offices not more than one of which may be held by a single individual, and certain other offices not more than two of which may be held by a single individual. Certain other offices are described which may not be held by members of the General Court.

The positions of register of probate for Hampden County and special justice of the District Court at Holyoke are not so designated in the Constitution but that they may be held by one individual. There appears to be no provision of statutory law making it illegal for one person to hold both of these offices, and I consequently advise you that it will be constitutional for the person whom you name in your letter to retain his office as said special justice while holding also the position of said register of probate.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Director — Two Positions — Text Books.

A person may not hold the position of principal of the Massachusetts School of Art and State Director of Art Education if he has a direct or indirect pecuniary interest in the books or school supplies used in public schools.

Nov. 15, 1929.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion as to the application of G. L., c. 15, § 5, as it affects the services of a person employed as principal of the Massachusetts School of Art and State Director of Art Education, in so far as such person may have a pecuniary interest in books or supplies used in the public schools.

G. L., c. 15, § 5, in its pertinent parts, reads as follows: —

"Except in the case of the teachers' retirement board, the division of public libraries, the division of the blind and institutions under the department, the commissioner may appoint such agents, clerks and other assistants as the work of the department may require, may assign them to divisions, transfer and remove them and fix their compensation, but none of such employees shall have any direct or indirect pecuniary interest in the publication or sale of any text or school book, or article of school supply used in the public schools of the commonwealth."

You have advised me that a single person is employed by your Department under one title or description but with two distinct lines of work, with dissimilar duties: namely, first, as principal of the State school of art, which you tell me corresponds in general scope of administration to that of a State normal school, and, second, as Director of Art Education; and I am informed that the duties of this latter position are not unlike the functions usually discharged by the agents appointed under the provisions of said section 5, except that they are confined to promotion of a single branch of education only, — that of art. In your letter to me

you have described the duties which such person performs as Director of Art Education as follows: —

"He visits the various towns and cities of the Commonwealth for the purpose of conferring with art supervisors and school officials on their art programs in the public schools; addresses groups of people on art subjects; confers with art supervisors and school officials; and conducts regional conferences of art supervisors."

If the duties of the person who bears the title of principal of the Massachusetts School of Art and State Director of Art Education were confined to the administration of the School of Art, the prohibition of said section 5 would not be applicable to such a person, for the reasons set forth in an opinion of one of my predecessors in office rendered to you August 5, 1924 (VII Op. Atty. Gen. 495), inasmuch as it appears plain that in the capacity of such a principal alone he would not be an agent of the Department appointed under the authority of said section 5, but rather would be appointed by virtue of G. L., c. 73, § 1, as amended by St. 1926, c. 6. But the duties of the person who bears the said title embrace also duties such as visiting cities and towns and doing other acts particularly prescribed for agents of the Board under earlier statutes, now embodied in said section 5 (P. S., c. 41, § 9; R. L., c. 39, § 9).

It would seem that in his capacity as State Director of Art Education he is acting as an agent of the Department, within the meaning of said section 5, and, though called a director, his appointment would appear to be that of an agent, made by virtue of the provisions of said section 5, especially as no specific statutory authority exists relative to the directorship of art education, and no division of art education which would require a director as its head appears, from what you have advised me, to be in existence.

Since, then, the position in question is, in part at least, that of an agent appointed under G. L., c. 15, § 5, the incumbent is subject to the terms of said section relative to pecuniary interest in books and supplies.

Consequently, I am constrained to advise you that a person may not lawfully hold the position called principal of the Massachusetts School of Art and State Director of Art Education if he has "any direct or indirect pecuniary interest in the publication or sale of any text or school book or article of school supply used in the public schools of the Commonwealth." If, as a matter of fact, the two employments constitute one position, such a pecuniary interest would debar a person from holding the same.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

State Board of Retirement — Members — Probation.

The Board has authority to make a by-law that an employee shall not be a member during a probationary period of employment nor until ninety days thereafter, and an employee has not the right to apply for retirement during such periods.

Service of members is to be computed alone from the beginning of non-probationary employment by the Commonwealth.

Nov. 16, 1929.

Hon. JOHN W. HAIGIS, *Chairman, Board of Retirement.*

DEAR SIR: — You have asked my opinion upon the following questions relating to the authority of the Board of Retirement: —

"(1) Has the Board exceeded its authority in establishing a by-law that an employee shall not become a member during a period of probationary employment?

(2) Is it correct for the Board not to enroll a person until ninety days after he has completed a period of probationary employment?

(3) Is it correct after the enrollment of an employee to include the probationary plus additional ninety days of service when computing his total period of continuous service for retirement benefits under the law?

(4) Has an employee any rights under G. L., c. 32, § 2 (9), to apply to the Board for retirement during a probationary period of employment and the additional ninety days specified by the law?"

G. L., c. 32, § 2, provides that —

"There shall be a retirement association for the employees of the commonwealth."

Section 1, as amended by St. 1922, c. 341, § 1, defines "employees," as the word is used in said chapter 32, as —

"Persons permanently and regularly employed in the direct service of the commonwealth . . . whose sole or principal employment is in such service."

G. L., c. 31, § 3, provides that the Civil Service Commissioners may make rules and regulations which shall regulate "the selection of persons to fill appointive positions in the government of the commonwealth," and that such regulations shall include — "(*e*) A period of probation before an appointment or employment is made permanent." You advise me that the Civil Service Commissioners have duly made a regulation providing a probationary period of six months in the classified service before an appointment or employment is made permanent. It is plain that a person while employed during a probationary period, whether his employment is under civil service or not, is not, from the very nature of such employment, a "permanent" employee of the Commonwealth; and that he was not, if under civil service, intended by the Legislature to be considered as one follows from the language of G. L., c. 31, § 3 (*e*), above quoted.

The provision of G. L., c. 32, § 2 (2), that "persons who enter the service of the commonwealth hereafter shall, upon completing ninety days of service, become thereby members of the association," would seem to apply only to persons who enter the service of the Commonwealth as permanent employees, for such alone are eligible to membership in the association. It would therefore follow that a period of ninety days from the expiration of a probationary period of employment should elapse before an employee could be said to be a member of the association and entitled to the benefits thereof.

Accordingly, I answer your first and second questions in the affirmative, and your fourth in the negative.

The answer to your third question involves a consideration of other factors in addition to those affecting the answers to your other queries.

G. L., c. 32, § 2 (4), as amended by St. 1925, c. 12, provides that —

"Any member who reaches the age of sixty and has been in the continuous service of the commonwealth for a period of fifteen years immediately preceding may retire."

Paragraphs (5) and (8) contain similar references to "continuous" service with relation to periods entitling a member to retire.

I am informed that it has been the practice of your Board to include the time of a probationary employment and the ninety days of employment before a person gains membership in the association as parts of the period of continuous service mentioned in said paragraphs (4), (5) and (8). I am of the opinion that your departmental practice in this respect is correct. It appears from the definition of "continuous service" set forth in said section 1, above quoted, and from the absence of any provisions in said chapter 32 indicating an intention on the part of the Legislature to make the "continuous service" essential to retirement coincident with continuous membership in the association, that continuous service is to be computed from the beginning of employment of a member by the Commonwealth and not from the beginning of his membership in the association.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Secretary of the Commonwealth — Initiative Petition — Transmission to General Court.

The Secretary of the Commonwealth must transmit a certified initiative petition, having the required number of signatures, to the General Court upon and not before its assembling.

Nov. 26, 1929.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have asked my opinion as to your duty with relation to the transmission to the General Court of an initiative petition, duly signed by the required number of qualified voters, which has been filed with you. Your request reads as follows: —

"Will you kindly give me your opinion whether such petition must be transmitted to the Clerk of the House of Representatives upon the exact date of assembling of the General Court or whether it may be transmitted prior to that date?"

The meaning of the applicable provision of the Constitution seems clear upon this matter. Mass. Const. Amend. XLVIII, The Initiative, *II. Initiative Petitions,* § 4, is as follows: —

"*Transmission to the General Court.* — If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall, upon the assembling of the general court, transmit it to the clerk of the house of representatives, and the proposed measure shall then be deemed to be introduced and pending."

This section of the Constitution places upon you the duty to transmit to the Clerk of the House of Representatives such an initiative petition at a fixed time, namely, "upon the assembling of the General Court."

The time of such transmission is not left to your discretion, and I am of the opinion that you are not authorized to transmit the petition before the time designated in section 4.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Commissioner of Correction — Life Prisoner — Removal to State Prison Colony.

The Commissioner of Correction may, in his reasonable discretion, remove a life prisoner from the State Prison to the State Prison Colony.

NOV. 30, 1929.

Dr. A. W. STEARNS, *Commissioner of Correction.*

DEAR SIR: — In a recent communication to me you state: —

"St. 1927, c. 289, § 1, states that 'the commissioner may remove to the state prison colony *any* prisoner held in the state prison,' etc.

G. L., c. 265, § 2, provides that 'whoever is guilty of murder in the second degree shall be punished by imprisonment *in the state prison for life.*'

Before this Department orders the transfer of any life prisoners from the State Prison to the State Prison Colony I desire to ask your opinion as to the legality of the same."

G. L., c. 265, § 2, provides: —

"Whoever is guilty of murder in the first degree shall suffer the punishment of death, and whoever is guilty of murder in the second degree shall be punished by imprisonment in the state prison for life."

G. L., c. 125, § 41B (St. 1927, c. 289, § 1), provides: —

"The commissioner may remove to the state prison colony any prisoner held in the state prison who, in his judgment, may properly be so removed and may at any time return such prisoner to the state prison. Prisoners so removed shall be subject to the terms of their original sentence and the provisions of law governing parole from the state prison."

The provisions of G. L., c. 265, § 2, standing alone, are mandatory, and the judge of the court in which a prisoner has been convicted of murder in the second degree must impose upon such person the sentence of imprisonment for life in the State Prison, and a sentence, so imposed, with certain exceptions, is required to be executed in the State Prison.

St. 1927, c. 289, § 1, in my opinion, constitutes an exception to the mandatory provisions of G. L., c. 265, § 2. The words "any prisoner," as used in St. 1927, c. 289, § 1, are sufficiently broad to include prisoners serving life sentences. If the Legislature had intended to limit the removal of prisoners from the State Prison to the State Prison Colony to only those prisoners sentenced to that institution for a term of years, it would have used appropriate language to express that intent, as it did in the passage of St. 1898, c. 393, §§ 5 and 7, now G. L., c. 125, § 39, where it specifically provided that "such male prisoners, except those serving sentences for life in the state prison, . . . may be removed from the state prison" to "the prison camp . . . at West Rutland."

The words "may properly be so removed" are to be construed to mean that any prisoner in the State Prison, except such prisoners confined

therein in the manner and for the purposes provided by G. L., c. 279, § 44, may be removed to the State Prison Colony if, in the judgment of the Commissioner, such prisoner, by his disposition and previous conduct, has shown that he will be amenable to the discipline at said State Prison Colony and will benefit by his removal thereto.

I am of opinion that the Commissioner of Correction may remove a prisoner serving a life sentence in the State Prison to the State Prison Colony, provided that he is of the opinion that such prisoner may "properly be so removed."

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

INDEX TO OPINIONS.

PAGE

Agricultural seeds; retailer; name on package 94
Animal Industry, Division of; rules; poultry; animals 72
Banking; deposits in two names; joint accounts 57
Barbers; investigation by Department of Public Health 91
Certified public accountant; change of business name; registration . . 43
Charitable trust funds; *cy-pres* doctrine 78
Citizenship; registration of voters 115
Civil service; chief of police of Leominster 123
  Clerk of election commission of Lowell; appointment 96
  Labor service; rules 81
  Veteran; Auditor of the Commonwealth 103
Clerk of a Senate committee; secretary of a joint special commission; wages or salary 104
Common drinking cups and towels; rules; Department of Labor and Industries 49
Compressed air tank; operation of pneumatic machinery 74
Constitution; Treasurer and Receiver General; vacancy in office . 41, 46
Constitutional law; charitable trust funds; *cy-pres* doctrine 78
  Savings bank life insurance; statutory limitations 63
  Stock of a trust company held by other banking organizations . . . 60
  Water supply; cities 75
Corporations; certificate of change in stock; fee 92
Correction, Commissioner of; life prisoner; removal to State Prison Colony . 129
Deer, killing of, during open season; restriction by Governor or Commissioner of Conservation 44
Education, Department of; employees; pecuniary interest in text books . 125
Eighteenth Amendment; instructions by voters to legislators under public policy act 38
Fish; cold storage; fresh; advertising 69
Forfeited automobiles; sales by Department of Public Safety 50
Governor and Council; approval of erection of radio equipment upon the roof of the State House 83
Incompatibility of offices 124
Initiative petition; transmission to the General Court by the Secretary of the Commonwealth 128
Inspector of slaughtering; appointment by local board of health . . . 79
Insurance; fraternal organizations; certificates 107
  Installment notes; small loans law 52
  Life policies; incontestability; forms 111
  Stock company; dividends 47
Labor and Industries, Department of; rules as to common drinking cups and towels 49
Laborers; contracts; public works; payments 90
Lowell, election commission of; clerk; civil service 96
Marriage and divorce; records; corrections 88
Massachusetts Agricultural College; committee of trustees to authorize expenditures 102
Medical examiner; absence; associate 96
Metropolitan Planning, Division of; jurisdiction 44
Milk; misbranding; prosecution 90

PAGE
Motor vehicles; compulsory insurance act; express business 62
Interpretation of "right to operate"; revocation 84
Over-all length; trailers; permits; public ways 67, 121
Physician; certificate of registration; presentation to city or town clerk . 110
Public Health, Department of; inspector of slaughtering; appointment; local board of health 79
Investigation of barbering 91
Taking of land by local authorities for protection of water supply; consent of department 39
Public policy act; instructions by voters to legislators; Eighteenth Amendment 38
Public records; corrections by city and town clerks; marriage and divorce . 88
Death records; diseases 101
Marriage records; certificate of filing of intention 101
Public Records, Supervisor of; rules; custody 97
Public welfare; minor children; settlement 109
Retirement system; certain employees of the Department of Correction; "officers" 86
Members; probationary period 126
Penal institutions officer; duration of service 65
State employees; retirement ages 51
Sentence; State Farm; indeterminate sentence 98
State Fire Marshal; delegation of authority to a city council and the head of the fire department, jointly, to issue licenses and permits . . . 68
Enforcement of rules; local authorities 118
Municipalities; ordinances; storage and use of explosives and inflammable fluids; fire prevention 119
State hospital; authority of superintendent to allow inmates to leave grounds 114
Statute, acceptance of by a town; vote of inhabitants 53
Taxation; assessments on land taken for protection of water supply; payment by Metropolitan District Water Supply Commission . . . 42
Inheritance tax; life insurance policy; change of beneficiary . . . 59
Teachers' retirement law; assessments; failure to deduct assessments seasonably 105
Traffic signs in Boston; expense 48
Treasurer and Receiver General; vacancy in office 41, 46
Trust company; increase of capital stock; stockholders 70
Stock held by other banking organizations 60
Trust funds; commercial funds; mingling 54

RULES OF PRACTICE

In Interstate Rendition.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate.

(A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

925. 2-'30. Order 7857.